

COPY I

David Knuckey

January 27, 2010

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CAUSE NO. 48914

RLB CONTRACTING, INC.	*	IN THE DISTRICT COURT OF
	*	
	*	
V.	*	BRAZORIA COUNTY, TEXAS
	*	
PORT FREEPORT,	*	
FORMERLY KNOWN AS	*	
BRAZOS RIVER HARBOR	*	
NAVIGATION DISTRICT	*	239TH JUDICIAL DISTRICT

VIDEOTAPED DEPOSITION OF

DAVID M. KNUCKEY

JANUARY 27, 2010

VIDEOTAPED DEPOSITION OF DAVID M. KNUCKEY, produced as a witness at the instance of the Plaintiff, and duly sworn, was taken in the above-styled and numbered cause on the 27th day of January, 2010 from 1:31 p.m. to 5:26 p.m., before TOI K. DOWELL, CSR in and for the State of Texas, reported by machine shorthand at the offices of Oaks, Hartline & Daly, 7 West Way Court, Lake Jackson, Texas, pursuant to the Texas Rules of Civil Procedure and the provisions stated on the record or attached hereto.

SCANNED

1 A P P E A R A N C E S

2

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11 FOR THE DEFENDANT, PORT FREEPORT:

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Lake Jackson, Texas 77566

14 Phone: (979) 297-9755

15

ALSO PRESENT: Phyllis Saathoff

16 Mr. Devin Ferguson, Videographer

Mr. Randy Boyd

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1 THE VIDEOGRAPHER: Today's date is January 27,
2 2010. We are on the record at 1:31. We are located at
3 Oaks, Hartline & Daly, at No. 7 West Way Court in Lake
4 Jackson, Texas. My name is Devin Ferguson, Associated Court
5 Reporters in Houston, Texas. Cause number is 48914; styled
6 RLB Contracting versus Port Freeport. It's in the 29th
7 [sic] JD Court of Brazoria County. Deponent is David
8 Knuckey. Will all counsel identify themselves for the
9 record, please?

10 MR. ROBERTS: My name is David Roberts. I'm
11 counsel for RLB Contracting; and I have with me as our
12 corporate representative, Mr. Randy Boyd.

13 MR. WOMMACK: George Wommack, Oaks, Hartline
14 & Daly. I'm the counsel for Port Freeport. And I have as
15 my corporate representative, Phyllis Saathoff, the Managing
16 Director of Port Freeport.

17 THE VIDEOGRAPHER: Will the court reporter,
18 Toi Dowell, from Associated Court Reporters swear in the
19 witness?

20 (Witness sworn.)

21 THE REPORTER: Please state stipulations.

22 MR. ROBERTS: Pursuant to the Rules.

23 MR. WOMMACK: And Mr. Knuckey wants to read
24 and sign his deposition. If you'll send it to me, I'll get
25 it to him.

1 DAVID M. KNUCKEY,
2 having been first duly sworn, testified as follows:

3 EXAMINATION

4 BY MR. ROBERTS:

5 Q Mr. Knuckey, have you ever had your deposition
6 taken before?

7 A Yes.

8 Q Can you tell me how many times?

9 A Once back in 1980 -- late '80s.

10 Q And, for the record, would you state your full
11 name, please?

12 A David Michael Knuckey.

13 Q And your current address?

14 A 136 County Road 498, Sweeny, Texas.

15 Q And how are you employed?

16 A I'm the Director of Engineering and Construction
17 for Port Freeport.

18 Q Are you employed under contract or as an at-will
19 employee?

20 A As an at-will employee.

21 Q Who is your immediate supervisor?

22 A Phyllis Saathoff.

23 Q And does she have a supervisor?

24 A Yes.

25 Q And who would her supervisor be?

1 A Pete Reixach, the Executive Port Director.

2 Q And that's Mr. Reixach that you were here for his
3 deposition earlier previous to this deposition?

4 A Yes, sir.

5 Q I'd like for you to discuss generally what your job
6 duties are as engineer for the Port.

7 A My job duties include oversight of all the capital
8 improvement projects for the Port, along with major
9 maintenance projects, working with the -- the other
10 executives -- the other members of the executive staff to
11 develop and propose projects for future consideration for
12 the board, Board of Commissioners.

13 Q Now, you've heard previous agreements that I've had
14 with the other witnesses in this case about: If you don't
15 understand the question that I ask, that you would tell me
16 that so I can clarify it. Can we have that agreement?

17 A Yes, sir.

18 Q So, if I ask you a question, I can presume that you
19 understood it and then gave me the best answer you could
20 under oath?

21 A Yes, sir.

22 Q Also, you heard me talk about the fact that if any
23 counsel were to object, whether it be me or your own counsel
24 to some question, that you would stop right then and let
25 that objection be stated for the record so that the court

1 reporter could take that down.

2 A Yes, sir.

3 Q Did you understand all those instructions I gave
4 everybody else?

5 A Yes, sir.

6 Q Then in the interest of time, I'm not going to go
7 through them; but could you abide by those instructions?

8 A Yes, sir.

9 Q Was there ever any order given to RLB to use lime
10 in it if the moisture content was 15 percent or more above
11 optimum?

12 A Not to my knowledge, no, sir.

13 Q Who would have that knowledge?

14 A None that I know of.

15 Q How was use of lime, then, going to be determined?

16 A The lime -- the use of lime was -- was up to the
17 contractor's discretion based on the in-place moisture
18 content of material.

19 Q You never recall being at a meeting when you
20 pointed your finger and said, "Lime will only be used at 15
21 percent or more above optimum moisture content?"

22 A No, sir.

23 MR. WOMMACK: Objection --

24 A Excuse me. I'm sorry.

25 MR. WOMMACK: Objection, form of the question;

1 and Mr. Knuckey, if you'll just pause a moment to give us an
2 opportunity to conserve our objection.

3 Q (By Mr. Roberts) So, are you stating under oath
4 here today that you did not give that directive?

5 A That is correct.

6 Q How would such a directive affect the efficiency of
7 this project?

8 MR. WOMMACK: Object to the form of the
9 question.

10 A It would -- if that type of instruction were given
11 by the owner or by the owner's representative, it would
12 basically be impeding the means and methods that the
13 contractor's responsible for.

14 Q (By Mr. Roberts) Would it do anything to the time
15 frame of drying dirt between optimum and 15 percent?

16 A Yes, sir.

17 Q What would it do to that?

18 A It would -- it would cause him to probably have to
19 go ahead and mechanically dry the material.

20 Q And would that -- what would that do to the number
21 of days that it would take to complete this project?

22 A It could possibly increase the number of days.

23 Q If the dirt is wetter than dry, does it normally
24 take longer to dry mechanically, to dry dirt -- drier dirt?

25 A I don't understand the question.

1 Q All right. Let me rephrase. It was poorly
2 phrased. Is there any correlation between the wetness of
3 the dirt and the dry -- and the time that it takes to dry
4 it --

5 A Yes.

6 Q -- based on percentage of moisture?

7 A Yes.

8 Q What is that correlation?

9 A It takes longer. If the material is wetter, it
10 takes longer to dry it to get it to within the acceptable or
11 within the allowable moisture content.

12 Q And is lime one of the effective methods that you
13 can use to accelerate that time to dry it faster?

14 A Yes, sir.

15 Q And what kind of lime were we talking about in this
16 particular project?

17 A We're talking about quicklime.

18 Q All right. And is that the pelletized lime that
19 some people refer to in the depositions that you've heard so
20 far?

21 A Yes, sir.

22 Q Was the contract written with -- with that kind of
23 lime?

24 A Yes.

25 Q How did you determine the amount of lime that you

1 were going to put into the contract?

2 A I made a -- I made a judgment call on the amount of
3 material that would need to be dried and made an assumption
4 based on past experience on the percent of lime content
5 within that soil to determine the tonnage of lime required.

6 Q Now, did if -- in that, did you use the 365,000-ton
7 figure that we've heard about in some of the previous
8 depositions?

9 A The 365,000 I believe was the bid quantity for the
10 amount of excavation?

11 Q Yes, sir.

12 A I took a percentage of that, yes.

13 Q And was that what percentage?

14 A I believe I took -- I forget if it was one third or
15 one half of that amount.

16 Q Let me give you something that may help you refresh
17 your memory here. And I want to show you what we're going
18 to mark as Exhibit No. 1 to your deposition.

19 (Plaintiff's Exhibit No. 1 was marked for
20 identification.)

21 Q (By Mr. Roberts) Now, there are two e-mails on that
22 particular printout; is that correct?

23 A Correct.

24 Q That exhibit to your deposition? Now, for
25 understanding purposes, the original message is actually the

1 second one; is that correct?

2 A That's correct, yes, sir.

3 Q And on January the 19th, 2007 at 3:00 p.m., you
4 would have sent an e-mail according to this; is that
5 correct?

6 A That's correct.

7 Q Who did you send it to?

8 A To Jerry Thibeaux and William Goldston with
9 Goldston Engineering.

10 Q And who did you carbon copy?

11 A A copy to Don Cheline, project coordinator, and
12 Linda Matcheski who was the departmental secretary at the
13 time.

14 Q I want to first ask you about the part of that
15 e-mail that said that you had a chance to talk to Pete and
16 Phyllis this morning, and we decided to hold the
17 construction period to 180 days. This will require a fair
18 amount of lime as a chemical drying agent.

19 What -- what were you trying to convey there?

20 A To -- we were looking at -- looking at, with the
21 amount of material that we were talking about, the 365,000
22 cubic yards, it was my opinion it would take much longer
23 than that to air-dry that because a lot of that material
24 would be excavated from below the waterline, and that the
25 only way to keep it within the six month, 180-day period was

1 to use a chemical drying agent to expedite the drying
2 process.

3 Q Now, at this point in time, had you talked to the
4 contractor about a proposal for drying it mechanically?

5 A This, I believe, was prior to the bid date.

6 Q And so the other conversation was after the bid
7 date; is that correct, about mechanically drying it? Did
8 you have a -- did you have a conversation with a contractor
9 about mechanically drying it after the contract was --

10 A I had a conversation after the contract was
11 awarded?

12 Q Yes, sir.

13 A To look at an options to reduce the amount of lime
14 to use to chemically dry it and to air-dry and to see what
15 that would do to the -- not only to the schedule but also to
16 the overall project cost.

17 Q And what was the result of that?

18 A The proposal that the contractor came back, I
19 forget the number of calendar days we were looking at for
20 construction period, but the cost -- the cost savings was
21 not, at least in my opinion, was not substantial enough to
22 warrant reducing of the lime and extending the contract
23 period.

24 Q In lay terms, it was going to be taking more time?

25 A It was going to take more time.

1 Q But it would cost less money or more money?

2 A Less money.

3 Q And in the assumptions that you made, let's talk
4 about those. You assume 30 percent of the excavation fill
5 will need lime treatment, and there's a calculation there of
6 365,000 cubic yards, times 0.3 to arrive at 109,500 cubic
7 yards. Is that -- is that what you thought would have to be
8 dried --

9 A That was an assumption.

10 Q -- with lime?

11 A That was an assumption I made, yes.

12 Q All right. And so under your assumption, if
13 there's more that has to be ex -- a percentage of the
14 excavation, then the lime would go up if it went to, say, 35
15 percent?

16 A If we assume -- assuming 5 percent lime content,
17 yes.

18 Q Okay. Actually, what happened to the contract was
19 what percentage, lime contract that y'all determined was
20 optimum?

21 A I think the contractor used approximately 3 percent
22 lime in the -- in the 3 percent lime content by volume to
23 bring the material to within an acceptable moisture content.

24 Q Where did you get that information?

25 A That was based on the amount of -- the amount of

1 lime that was actually used based on truck tonnage that was
2 provided to us by the contractor, and also based on the
3 amount of material that was actually mixed, the number of
4 cubic yards of material that was chemically dried, which was
5 based on field reports from our inspector in the field.

6 Q And so how would they actually calculate that? By
7 a truckload?

8 A The number of cubic yards, they based it on surface
9 area and -- and -- and using an average depth of 12 inches
10 for each lift.

11 Q And you say you assumed 5 percent lime content by a
12 volume. Are you sure about that 3 percent, or could it --
13 could it have been another number?

14 A Like I say, based on the -- based on the amount of
15 number -- the number of cubic yards was actually chemically
16 treated with lime, which was based on the reports that I
17 received from my field inspector and based on the tonnage of
18 lime that was used, the -- the actual lime -- well, the
19 average lime content used for chemically drying was about
20 3 percent.

21 Q Let's back up over -- back up if we can. Maybe I'm
22 just dense. But you calculated that mathematically, I
23 guess, by taking 365,000 yards. Right?

24 A Correct.

25 Q And I'm talking about the actual calculation now.

1 And what did you do to that number to get to what you
2 thought or was the actual amount of lime used?

3 A You've got two factors. You've got the lime and
4 you've got the number of cubic yards. I started out by
5 making an educated guess that about 30 percent of the
6 material would probably need to be chemically dried. So I
7 took 35 percent of the 365,000 cubic yards of excavation
8 which was calculated by the engineer, by Goldston
9 Engineering, and come up with 109,500 cubic yards; and then
10 from there, I assumed a rough-line content of 5 percent by
11 volume.

12 Based on past projects, that 5 percent of lime equated
13 to about 27 -- well, it's actually -- it equated to 27-cubic
14 feet per cubic yard. Oh, I'm sorry. Well, there's a
15 formula down there that we use to go ahead and approximate
16 because you have to know what the soil weighs in order to go
17 ahead like that and determine the actual lime content. And
18 based on past experience, we went ahead and went ahead and
19 just took 5 percent of the total cubic yards of material to
20 be chemically dried of the fill material, took 5 percent of
21 that; 5 percent of that total volume of 105 -- 109,500 cubic
22 yards and came up with a number of approximately 15,220 tons
23 of lime.

24 Q And I guess what I'm asking you to distinguish --
25 now, I understand how you came up with the 15,220 tons.

1 A Right.

2 Q My question is, how did you actually measure the
3 percentage of excavation that will need lime treatment?

4 A The first assumption, the 30 percent?

5 MR. WOMMACK: Excuse me.

6 THE WITNESS: I'm sorry.

7 MR. WOMMACK: Objection, form of the question.

8 Go ahead.

9 A I made an educated guess of 30 percent.

10 Q (By Mr. Roberts) How did you do it after the fact
11 to determine what percentage of --

12 A After the fact --

13 Q -- stabilized?

14 A -- we took the amount of -- the amount of -- the
15 amount of lime, the actual tons of -- of -- of lime that
16 were delivered to the site.

17 Q Right.

18 A Based on the -- based on the -- the truck tickets
19 that were provided to us by the contractor. And we took
20 that, and we compared that with the -- with the actual
21 amount of soil that was treated with lime; and with those
22 two, it came out, I believe it was about 3-percent lime
23 content.

24 Q Now, the 62.4 pounds per cubic foot?

25 A That's just the weight of water. The specific --

1 the specific gravity of -- of a lime is 3.3. So, if you
2 multiply that 3.3 times 62.4, that will basically tell you
3 how many pounds of lime there is in a cubic foot, pure lime.

4 Q But the 3.3 number in your calculation assumed 30
5 percent?

6 A No. The 3.3 has nothing to do with the percentage.
7 3.3 is the specific gravity of --

8 Q Okay.

9 A -- lime.

10 Q Okay. What is the 27?

11 A Twenty-seven cubic feet per cubic yard. One cubic
12 yard is 3 feet by 3 feet by 3 feet.

13 Q And 5,475 cubic yards?

14 A That was 5 percent of the 109,500 cubic yards of
15 soil that I assume would have to be treated -- chemically
16 treated.

17 Q Okay. If that number goes up, what happens to your
18 lime?

19 A If you --

20 MR. WOMMACK: Object to the form of the
21 question.

22 A If -- which number? I'm sorry.

23 Q (By Mr. Roberts) The 5,475 cubic yards.

24 A If that number goes up and you still use the
25 5-percent lime content by volume, the weight of required

1 lime would go up.

2 Q Okay. Does the weight of the dirt have anything to
3 do with it at all?

4 A Not if you calculate it by volume, no.

5 Q Is that going to be an accurate way to do it if
6 your dirt is wetter sometime than other times?

7 A Moisture content has nothing to do with --

8 Q With volume?

9 A -- with the volume; that's correct.

10 Q I understand that. But isn't it true that if you
11 use more lime on wetter soil --

12 A The amount of lime that you use with the soil is
13 dependent upon the moisture content, depending upon -- it's
14 dependent upon how much you're trying to decrease the
15 moisture content to get it within the acceptable -- the
16 acceptable range.

17 Q And that correlation is -- or what is that
18 correlation? The higher it goes, what does it --

19 MR. WOMMACK: Object.

20 Q (By Mr. Roberts) The moisture content -- the higher
21 the moisture content, what would be the correlation there?

22 MR. WOMMACK: I'm going to object to the form
23 of the question. Mr. Knuckey, if you'll just pause a minute
24 to allow me to do that, I'd appreciate it.

25 A Okay. The higher moisture -- the higher the

1 moisture content is above optimum, the more lime it would
2 take to reduce that down to within the acceptable moisture
3 content range.

4 Q (By Mr. Roberts) Okay. What is the weight of dirt
5 compared to water?

6 A I don't understand that question at all.

7 Q Well, if I take a bucket half full of dirt and pour
8 half -- the other half full of water, is that going to weigh
9 more or less than a bucket of the dry dirt?

10 A Normally your dry dirt will weigh more than water.

11 Q Okay. Did you discuss the -- or do you agree with
12 the proposition that it's more difficult to move wetter dirt
13 than it is dry dirt and compact it?

14 A Well, that's two questions. If you're talking
15 about transporting the dirt from Point A to Point B, whether
16 the dirt -- whether the moisture content -- no matter what
17 the moisture content is, it's not going to be that much more
18 difficult, other than -- other than you can't hold as much.
19 If the material is saturated, and it's actually flowing and
20 running out of the trucks, it's more difficult to transport
21 it from Point A to Point B.

22 Q Now, we've heard quite a bit of testimony here that
23 it was sometimes almost oozing out.

24 A Yes, sir.

25 Q Did you see that in that prior deposition?

1 A Yes, sir.

2 Q Wouldn't that dirt be more difficult to move the
3 same quantity of that dirt than it would the same quantity
4 of dry dirt?

5 A It could, yes.

6 Q It would also require more time to dry that dirt,
7 the wetter it is?

8 A If you were air-drying it, I would have to say yes.
9 If you were chemically drying it, it would take a little
10 more time; but not as much.

11 Q Okay. Does it affect how your equipment can run
12 over that dirt whether it's wet or dry? Does that have any
13 affect on it?

14 A If the material is too wet, in some cases you
15 cannot run on top of that dirt.

16 Q Okay.

17 A You get stuck.

18 Q Did that happen on this job?

19 A There was some occasions out there, yes, sir.

20 Q Okay.

21 A Would there be any reason that you can think of
22 for the contractor not to voluntarily use more lime?

23 A No, sir.

24 Q Did you hear the discussions about saving the Port
25 money that the engineer discussed?

1 MR. WOMMACK: Object to the form of the
2 question.

3 A I don't recall it was the engineer that discussed
4 that.

5 Q (By Mr. Roberts) Who was it that you recall --

6 A The representative from PSI made a comment about he
7 was looking out for the Port's interest, I understand, like
8 that, and trying to keep from using as much lime to save us
9 from gambling away, or something of that sort, of the Port's
10 money.

11 Q Okay. I guess I'm trying to determine how that was
12 made if he's over here, and I think he told us he was on the
13 Port's "team," was the word he used; is that correct?

14 A Yes, sir.

15 Q And he's trying to keep the cost of the lime down.
16 How was -- how was that accomplished?

17 A He --

18 MR. WOMMACK: Object to the form of the
19 question.

20 A PSI had no authority to instruct the contractor as
21 to how much lime he was to use. PSI's responsibility on
22 this project with to determine the moisture content of the
23 material, inform the contractor and the owner -- the owner's
24 representative or our inspector what the moisture content --
25 what the optimum moisture content was based on the type of

1 soils they were encountering, and the contractor was to take
2 it from there and decide how much lime or whether to even
3 use lime to go ahead and bring it to within an acceptable
4 moisture content range.

5 Q And was that recommendation in the amount of the
6 lime, did that come from your team member there from PSI?

7 MR. WOMMACK: Object to the form of the
8 question.

9 A The recommendation that's in -- in this e-mail?

10 Q (By Mr. Roberts) No, no, sir. Just in general in
11 the job, when it happened.

12 A Basically there was no recommend --

13 MR. WOMMACK: Object to the form of the
14 question. Go ahead.

15 A There was no -- PSI with a not -- not hired and was
16 not retained to give any recommendations to the contractor
17 as to how much lime to use.

18 Q (By Mr. Roberts) So, they didn't do any
19 calculations to determine how much lime based upon the
20 moisture content that they determined in their lab?

21 A I don't know if they -- if the PSI representative
22 made any calculations or not. I never saw any calculations;
23 and here again, I'll state -- that was not -- that was not
24 part of his responsibility.

25 Q Now, did the PSI representative, when he took these

1 samples that we talked about in the previous deposition,
2 what was he doing that for?

3 A He took samples to determine the -- he took samples
4 for two reasons. One was to go ahead and in the case to
5 determine the relationship between the maximum dry density
6 and the moisture content to determine what -- or determine
7 the maximum dry density and the optimum moisture content,
8 what they call a proctor.

9 He also took samples to go back in and do a chemical
10 analysis based on, I believe it was, pH to determine the
11 optimum lime content; but that optimum lime content was not
12 for chemically drying. The optimum lime content was to
13 change the plasticity, the physical properties of the
14 material, which was not part of our concern.

15 Q I'm having a little trouble with that. If he's
16 making the calculation for the optimum-lime content, doesn't
17 he have to tell somebody?

18 A He was making the -- he was making -- he was
19 running a test to determine the optimum lime content to
20 bring the material to a certain level of acidity, basically
21 to reduce the plasticity but that was not --

22 Q Would that be quantity of lime?

23 A It would be -- it would be a percentage of lime to
24 be mixed with the soil, yes.

25 Q As an engineer, how would you communicate that to

1 somebody?

2 A If we were looking at trying to take a -- a -- a --
3 plastic material, a clay, and trying to get it where
4 plasticity was low enough where you didn't have a problem
5 with shrink and swell, which is the big problem we have with
6 the soils here in Brazoria County, then you would go ahead
7 and determine the lime content, and then you would normally
8 use hydrated lime or a lime slurry for stabilization of the
9 soil. We were not using this -- we were not using
10 pelletized or quicklime to stabilize the soil. We were
11 using the quicklime as a dry -- as a chemical drying agent.

12 Q And you would -- I guess I'll ask my question
13 again. How would you tell somebody what they needed to do
14 to get to that optimum lime content?

15 A That's up to the contractor in his past experience
16 working with lime.

17 Q Okay. And in that case, then, do you test
18 afterwards to make sure that he got to the proper --

19 A You test of the moisture content.

20 Q -- content?

21 A You test it for moisture content to make sure that
22 the material is within -- within the acceptable range of
23 moisture content.

24 Q Do you ever make a calculation as to the lime
25 content?

1 A No, sir.

2 Q Is that just something that you assume throughout
3 the project based on the amount of lime you used? Is that
4 how you got your number?

5 A I got -- I got my number. The number I mentioned
6 about the approximate 3 percent is what he actually used.
7 The actual lime content was based on the tonnage of lime
8 that was used on the project and the number of cubic yards
9 that was chemically treated with lime.

10 Q Okay. When you did the -- and I'll call that the
11 second cal -- or the after-the-fact calculation. Did you
12 take into account the extra 33 -- 43,818 yards of dirt that
13 had to be moved?

14 MR. WOMMACK: Object to the form of the
15 question.

16 A That didn't -- that does -- does not come into play
17 in the calculations.

18 Q (By Mr. Roberts) That doesn't affect how much lime
19 has to be used or not used?

20 A How much lime that was used was how much lime that
21 was used. We have tonnage. We have truck tickets. The
22 number of cubic yards of material that was actually
23 chemically stabilized or chemically treated with lime is a
24 quantity that was calculated, irregardless of whether we're
25 talking 365,000 cubic yards, 406,000 cubic yards, or 800,000

1 cubic -- it -- it doesn't matter. It's the actual quantity
2 that you calculated that was actually treated.

3 Q How do you know what percentage of it is treated
4 and what percentage of it is not treated?

5 MR. WOMMACK: Objection, form of the question.

6 A We determined the surface area that the lime was --
7 was spread on. We assumed a 12-inch deep mixing; and based
8 on that, we calculated the number of cubic yards in that
9 area that was chemically treated. And based on that, and
10 based on how much actual tonnage of lime was placed in that
11 area, we determined what the -- what the -- what the -- we
12 basically back calculated the lime content as a percent.

13 Q (By Mr. Roberts) Do you have anything in regard to
14 those calculations that you retain notes or --

15 A The calculations were done based on the -- the --
16 the inspector's reports and in -- in consult with the
17 engineering firm, with Goldston Engineering, and the actual
18 -- the actual tickets of the -- of the lime that was used on
19 the job site.

20 Q Okay. Do you know how close your 30 percent was?

21 A From what I recall, we stabilized substantially
22 more material than the 30 percent, but we used less lime
23 than what -- than what was in the bid documents.

24 Q Does that equate to more efficiency by your
25 contractor?

1 A No, sir.

2 Q What -- what explains that to you?

3 A It doesn't equate more efficiency as that -- is
4 that my assumption that 30 percent of the material would be
5 -- would be -- would be wet -- wetter than what -- what --
6 what I assumed going into the project. That's all.

7 Q Let's talk about going into the project.

8 A Okay.

9 Q How long had y'all been working on this project
10 before it got to contract stage?

11 A I believe we started the design on this project
12 sometime in early 2006.

13 Q Okay. And when did you actually let -- award the
14 contract?

15 A I don't have the exact date, but the contract was
16 awarded in the first quarter of 2007.

17 Q Okay. And did you -- what did you hear about the
18 use of lime out there in the first quarter of 2007?
19 Anything?

20 A That was how much?

21 MR. WOMMACK: Object to the --

22 Q (By Mr. Roberts) Was there any --

23 MR. WOMMACK: Object to the form of the
24 question.

25 Q (By Mr. Roberts) -- any questions about the lime by

1 anybody?

2 A Not to my knowledge, no.

3 Q Nothing was reported to you about the problems with
4 the lime, or how much lime, or anything like that that
5 caused discussions with the engineering group that you were
6 with Goldston and your people?

7 MR. WOMMACK: I'm going to object to the form
8 of the question. Go ahead.

9 A The only issue that I was aware of, both in the
10 daily reports and from firsthand knowledge of going on the
11 site, was the methodology the contractor was using for
12 mixing the lime.

13 Q (By Mr. Roberts) And what was that methodology?

14 A That --

15 MR. WOMMACK: Excuse me. I'm going to object
16 to the form of the question, and since all of your questions
17 I assume are about the first quarter of 2007, until you
18 change your time period, can I have a running objection of
19 any question --

20 MR. ROBERTS: You can.

21 MR. WOMMACK: Since there was no work done in
22 the first quarter of 2007.

23 MR. ROBERTS: I'm not asking about work as
24 much as I am discussions about lime in that first quarter.

25 A The mixing of the lime, from what I observed, and

1 from past experience, was causing a large amount of dust.
2 The equipment was -- there was a question whether the
3 equipment was the proper equipment to mix it. The
4 methodology, the speed at which they operated the equipment
5 before the lime was actually incorporated into the soil --
6 into the wet soil was causing me concern because of the dust
7 coming up from the lime because basically pelletized lime,
8 once you crush that pellet, it's a very fine dry powder.

9 Q Are you aware of the first instant that was
10 reported to the contractor that there was any problem with
11 this by your representatives out in the field?

12 MR. WOMMACK: Objection to the form of the
13 question.

14 A I don't recall the exact date; but there were, I
15 think, three -- at least three occasions during -- during
16 the -- during the construction sequence where I received
17 phone calls from an adjacent neighbor complaining about the
18 lime dust.

19 Q (By Mr. Roberts) And who was the adjoining
20 neighbor?

21 A Freeport Launch.

22 Q What did you do after the first call?

23 A I called my inspector out there and told them that
24 this was not acceptable. From what I understand, the
25 inspector got with the contractor. They changed up their

1 methodology to not -- not as much eliminate the dust -- the
2 lime dust cloud from going onto adjacent property but doing
3 it at times of the day and also doing it on days when the
4 wind direction was such that the lime -- that the lime dust
5 cloud was not going onto the adjacent neighbor's property.

6 Q Do you think it's possible to put down lime without
7 dust?

8 A I think it's possible to put down -- put down
9 pelletized lime and control the dust to an acceptable level
10 where it does not leave the job site.

11 Q And how do you contain it within the job site?

12 A On a previous project that we had going on at the
13 time as this, we had an occasion to use about 300 tons of
14 pelletized lime. And the methodology used by that
15 contractor created no dust cloud whatsoever.

16 The material was -- was placed in the same method that
17 was placed on this project. It comes out -- it comes out in
18 tanker trucks. It's dumped down in a winrow out of the
19 bottom of the tanker truck. The material was then buried.
20 There was a light layer of dirt put over the top of it, and
21 then we went back in there with a Pulver Mixer and mixed
22 that material; and there was little, if any, dust left.

23 Q Did you ever go over this procedure with Mr. Boyd?

24 A I was -- we were not in a position to go ahead like
25 that and tell the contractor how to do his job.

1 Q Okay.

2 A And that's one thing I've instructed my people like
3 that that do not go ahead and tell the contractor his means
4 and methods.

5 Q Now, in regard to the second time that you had any
6 problem with lime, when do you recall that was?

7 A That was sometime early in I believe it was 2008
8 when I received a phone call from John Haas at Freeport
9 Launch.

10 Q And is that the phone call that resulted in
11 stopping the work?

12 A No, sir.

13 MR. WOMMACK: Wait.

14 THE WITNESS: I'm sorry.

15 MR. WOMMACK: Object to the form of the
16 question.

17 A No.

18 Q (By Mr. Roberts) When was that phone call about?

19 A They had -- they had a problem with -- some of
20 their employees out there were having a problem with -- with
21 -- with irritation in their eyes with the dust cloud. They
22 were getting some lime dust on some of the equipment, some
23 of the vessels that moored over at Freeport Launch.

24 Q What did you do about that at that time?

25 A I went back to my inspector and told him to get

1 with the contractor and tell him this was not acceptable.

2 They needed to go ahead and control the dust cloud.

3 Q And did they do that?

4 A At least up until the time I got a call, which was
5 sometime in April, early April.

6 Q Did you document that second phone call?

7 A No, sir.

8 Q Did you document the first phone call?

9 A No, sir.

10 Q Did you document the next call that you had in
11 April, I think you just told us?

12 A Other -- other than to get back with my inspectors;
13 and at that time, they went over -- that's -- that's when
14 the adjacent property owner explained that they were having
15 -- that their -- that their employees were having physical
16 symptoms of the lime dust with watering eyes, irritation of
17 nasal passage and the throat and was threatening to contact
18 the regulatory agencies to shut us down.

19 Q And did you follow-up and contact regulatory
20 agencies?

21 A No, sir, I did not.

22 Q Why not?

23 A I didn't see a need to if we could resolve the
24 problem.

25 Q And did you resolve the problem?

1 A We -- I thought we -- we had the problem resolved,
2 yes, sir.

3 Q What was the difference in stopping the work
4 between the first two times you just described to us and
5 this third time?

6 MR. WOMMACK: Objection to the form of the
7 question.

8 A We did not instruct the contractor to stop using
9 lime. We instructed the contractor to change his means and
10 methods so as not to cause -- cause a problem with adjacent
11 property owners; and that was the case, I think, in all
12 three cases. Now, in the third case that happened in early
13 April we instructed the contractor to stop using lime until
14 he could -- he could go ahead and use the lime without
15 causing problems with adjacent property owners.

16 Q (By Mr. Roberts) Let me show you a letter that
17 we're going to ask to be marked as Exhibit No. 2.

18 (Plaintiff's Exhibit No. 2 was marked for
19 identification.)

20 Q (By Mr. Roberts) In the first paragraph, the second
21 sentence, beginning with that sentence, what was the
22 directive according to this letter, April 4th, 2004
23 directive? Can you tell us?

24 A To cease the using of lime thereby eliminating the
25 hazard.

1 Q In Paragraph 3, second sentence, during the April
2 9th meeting, what were they told? What was the contractor
3 advised?

4 MR. WOMMACK: Objection, form of the question.

5 A We requested the contractor submit a proposal to
6 finish the job without using lime; to stockpile the
7 material, to go ahead and complete the excavation template.

8 Q (By Mr. Roberts) And when the letter says they were
9 advised not to use pelletized lime and to stockpile material
10 too wet to compact until it could be worked, how did that
11 affect what they were doing beforehand?

12 MR. WOMMACK: Object to the form of the
13 question --

14 Q (By Mr. Roberts) As far as moving the dirt and
15 compacting the dirt.

16 MR. WOMMACK: Object to the form of the
17 question.

18 A How did this -- I'm sorry.

19 Q (By Mr. Roberts) Yeah. How does stockpiling affect
20 the contractor? If you were a contractor out here and you
21 were digging dirt and taking it to a site and laying it down
22 and drying it and compacting it, and then someone directed
23 or advised you not to use pelletized lime -- and they
24 followed that direction, correct?

25 MR. WOMMACK: Object -- I guess that he --

1 Q (By Mr. Roberts) Did they follow that directive?

2 MR. WOMMACK: I object to the form of the
3 question.

4 A That's correct.

5 Q (By Mr. Roberts) What does that result in the
6 contractor having to do to the dirt as far as the number of
7 times that they have to handle that dirt?

8 A They would have to double-handle the material
9 taking it out of the stockpile and then placing it and
10 compacting it.

11 Q Okay. Would that take extra time?

12 A Likely so, yes, sir.

13 Q Has the contractor been given any extra days for
14 that?

15 MR. WOMMACK: Object to the form of the
16 question.

17 A No, sir, the contractor has not. We made an offer
18 to the contractor which the contractor refused.

19 Q (By Mr. Roberts) Did the contractor tell you how
20 many days, according to their records, it actually took?

21 A It was a combination of both time and cost, and we
22 made -- we made the contractor an offer, and he refused the
23 offer.

24 Q What was that offer?

25 A I think we had agreed to go ahead and pay him an

1 additional -- I don't remember right now if we agreed to pay
2 him twice the unit price per cubic yard to take the material
3 out of the stockpile, transport it to an area, and lay it
4 down and compact it for the -- I think it was approximately
5 20,000 cubic yards that he had stockpiled.

6 Q And how did you get the measurement of 20,000
7 yards?

8 A We estimated the size of the stockpile.

9 Q And who did that estimate?

10 A I believe that was done by -- by the engineer.

11 Q Did he actually survey it?

12 A I think they went out there and they actually
13 measured the circumference of the pile and the height of the
14 pile. There's some methodology used quite frequently to go
15 ahead and come up with an approximate -- approximate size of
16 how much -- approximate volume of the stockpile.

17 Q Okay. How about extra days? Did that take extra
18 time to do something like that?

19 MR. WOMMACK: Objection to the form of the
20 question.

21 A I forget if we had offered him additional time or
22 not. I don't remember.

23 Q (By Mr. Roberts) Would that be reflected in your
24 change orders?

25 A Was it reflected in our change orders?

1 Q (Counsel nods head.)

2 A No, it was not reflected in our change orders.

3 Q And if you signed a change order for the money part
4 of it that we were talking about earlier without the days,
5 where would you be?

6 MR. WOMMACK: Objection to the form of the
7 question.

8 A My -- my job is to make a recommendation to the
9 Board of Commissioners for any adjustments to contract time
10 or the contract amount, and --

11 Q (By Mr. Roberts) Okay.

12 A -- this never got to that point because we could
13 never come to an agreement as to -- as to the adjustment for
14 any contract time or the contract amount.

15 Q So, if you never agree, they never get paid.

16 A If we can't come to agreement, no, I have nothing
17 to go to the board with.

18 Q Okay. And you're the one that solely makes that
19 decision.

20 A I make that recommendation in -- in -- in consult
21 with my -- with my -- with -- with -- with my management
22 people to our Board of Commissioners.

23 Q Okay. But you made no recommendation in this case.
24 Is that what you're telling me?

25 MR. WOMMACK: Objection to the form of the

1 question.

2 A We could not come to an agreement on the amount --
3 on the amount of compensation for -- on the amount of the
4 adjustment to the contract time or the contract amount.

5 Q (By Mr. Roberts) Okay. What professionals or other
6 people after you had stopped the work out here, stockpiled
7 it, gone through this portion of the contract did you
8 consult about any of this?

9 MR. WOMMACK: Objection to the form of the
10 question.

11 Q (By Mr. Roberts) After you shut them down. Did you
12 consult with anybody?

13 MR. WOMMACK: Object to the form of the
14 question.

15 A I don't understand what you mean by other
16 professionals.

17 MR. ROBERTS: Exhibit 3?

18 (Plaintiff's Exhibit No. 3 was marked for
19 identification.)

20 Q (By Mr. Roberts) Do you still have Exhibit 2?

21 A Yes, sir.

22 Q In the first paragraph there, does it state why
23 Freeport's action was necessary to shut down the contractor?

24 MR. WOMMACK: Objection to the form of the
25 question.

1 A The first paragraph where?

2 Q (By Mr. Roberts) Well, it has a "1" in front of it,
3 Arabic 1, about on -- Exhibit 2. Sorry.

4 A Oh, I'm on Exhibit 3. Excuse me.

5 Q The letter we were talking about, it refers to an
6 article in the contract.

7 A It refers to Article 4.06D.

8 Q Do you agree that that was the Port's position that
9 it was necessary by contractor's failure to comply with
10 Article 4.06D of the General Conditions, which require
11 contractor to immediately stop all work? Does that
12 accurately reflect y'all's position?

13 MR. WOMMACK: I object to the form of the
14 question.

15 A I think 4.06D reflects the position that we took,
16 yes.

17 Q (By Mr. Roberts) Okay. Now, I want to now go to
18 Exhibit 3, and let's look at 4.06D, which you should have on
19 that exhibit, which is the second paragraph in the
20 right-hand column of that.

21 First, does Exhibit D, is it predicated on a hazardous
22 environmental condition?

23 A 4.06D has to do with either the contractor
24 encountering or if the contractor is responsible for a
25 hazardous environmental condition, yes, sir.

1 Q And the first thing you're supposed to do is what?
2 The contractor under this contract, that was prepared by the
3 Port, I think; is that correct?

4 A Yes.

5 Q Okay.

6 A Secure or otherwise isolate such condition.

7 Q Okay. Now, when your man out on the scene told
8 them to stop using lime, that would have complied with No.
9 1; is that correct?

10 A That would have complied with number -- with --
11 with -- with small "ii".

12 Q One and two, yeah. And in double "i": "Stop all
13 Work in connection with such condition." That happened.

14 A Correct.

15 Q And in No. 3 is: Notify the owner and engineer.
16 Y'all both knew about it, didn't you?

17 A Correct.

18 Q And promptly thereafter confirm such notice in
19 writing.

20 There's plenty of notes in this thing back and forth in
21 the minutes about everybody writing in their daily reports
22 and other places what happened; is that correct?

23 A Right.

24 Q What does it say the owner is to do, then?

25 A "The Owner shall promptly consult with Engineer

1 concerning the necessity for Owner to retain a qualified
2 expert to evaluate such condition or take corrective action,
3 if any."

4 Q Okay. And did you do that?

5 A I did not feel a need to retain a qualified ex --
6 expert.

7 Q Well, did you know how much lime was actually going
8 onto the adjoining property owner?

9 A No, sir.

10 Q Did you do any kind of quantification of how much
11 dust that was dirt versus lime?

12 A No, sir.

13 Q Did you call any of the agencies that deal with
14 that, like TCEQ and Air Quality Board, and the other people
15 that monitor those kind of things?

16 A No, sir.

17 Q Who made that decision not to retain a qualified
18 expert?

19 A It was my decision.

20 Q Did you give the contractor an opportunity to
21 isolate that condition as set forth in "i" before you gave
22 the stop using lime?

23 A I would interpret small "i": "Secure or otherwise
24 isolate such condition," is if a contractor encounters
25 hazardous environmental conditions.

1 The contractor did not encounter a hazardous
2 environmental condition. The contractor created a hazardous
3 environmental condition, in my opinion.

4 Q Well, let's talk about hazardous environmental
5 condition. Does your contract define a hazardous
6 environmental condition?

7 A No, sir, it's not defined.

8 Q Well, let me show you the definition section.

9 MR. ROBERTS: Can we have this marked the next
10 exhibit, please?

11 (Plaintiff's Exhibit No. 4 was marked for
12 identification.)

13 Q (By Mr. Roberts) Do you see the definitions
14 contained on this page?

15 A Yes.

16 Q Would you look at No. 22 and tell me what's defined
17 under your contract as a hazardous environmental condition?

18 A I correct my previous statement. "The presence at
19 the Site of Asbestos, PCBs, Petroleum, Hazardous Waste or
20 Radioactive Material in such quantities or circumstances
21 that may present a substantial danger to persons or property
22 exposed thereto in connection with the Work."

23 Q Was it asbestos?

24 A No, sir.

25 Q Was it PCBs?

1 A No, sir.

2 Q Was it petroleum hazardous waste?

3 A No, sir.

4 Q Radioactive material?

5 A No, sir.

6 Q So, it wasn't really a hazardous environmental
7 condition under your contract?

8 A By the definition of hazardous environmental
9 condition, I have to agree.

10 Q But that's what you shut them down for.

11 MR. WOMMACK: I object to the --

12 Q (By Mr. Roberts) Is that correct, from using lime?

13 MR. WOMMACK: I object to the form and the
14 string of questions.

15 A That's the clause of general condition that we --
16 that we've cited to tell them to cease using liming,
17 correct.

18 Q (By Mr. Roberts) Well, now, who -- who wrote this
19 letter? I think it's on Page 2?

20 A That was written by -- by the -- by the engineer.

21 Q And that's the one that told us in his deposition
22 that -- that he was the Port's engineer for this project?

23 A Correct.

24 Q Was he just wrong?

25 A Based on this definition, I'd have to say "yes."

1 Q And if he's wrong in shutting down this particular
2 job at that time, do you think he cost the contractor any
3 money?

4 A I can't say that. I -- I -- I -- I really can't
5 answer that.

6 Q Well, if he didn't work from April the 4th until
7 you finally let him go back to work, other than mechanically
8 drying lime, that is not using lime, would that affect his
9 critical path?

10 MR. WOMMACK: I'm going to object to the form
11 of the question.

12 A Yes, that would affect his critical path.

13 Q (By Mr. Roberts) And if that -- if you were wrong
14 in shutting down as a hazardous environmental condition,
15 under your own definition of your contract, would days be in
16 order to be awarded for that time?

17 A Possibly, so.

18 Q Before today, have you ever considered that you
19 could have been wrong about that?

20 A Based on this definition here, we probably should
21 not have called it a hazardous environmental condition. We
22 probably should have structured it as a health hazard.

23 Q Well, I'm looking through here for a health hazard;
24 but I don't see a definition for health hazard.

25 A Then we probably did not have the right to shut him

1 down.

2 Q Okay.

3 A We did not have the right for him -- to instruct
4 him to stop using lime and causing a health hazard to an
5 adjacent property owner.

6 Q Well, we don't even know what you mean by health
7 hazard, correct?

8 A Health hazard, as it was informed to me by the
9 property owner, that he had employees that were having
10 problems out there with eye irritation and with breathing.

11 Q Okay. How many employees are working at the -- at
12 the Port around this particular product?

13 A In this particular area?

14 Q Yes, sir.

15 A The contractor's employees?

16 Q Yes, sir.

17 A And the one adjacent property owner.

18 Q How many employees did they have on this job that
19 would have been around the lime?

20 A The contractor's employees?

21 Q Yes, sir.

22 A Somewhere between 15 and 30, depending on which
23 day.

24 Q And did any of the 15 to 30 people have any eye
25 problems or other problems as a result of this contract?

1 A None that were reported to us.

2 Q Okay. But if they have problems like that, aren't
3 they supposed to report those incidences if it results in
4 lost work time?

5 A I don't believe it's spelled out that way in the
6 general conditions, no, sir.

7 Q Okay. You wouldn't expect to know about that if
8 somebody got hurt out there or anything else?

9 A If someone had gotten hurt out there, we would have
10 heard about it, yes.

11 MR. ROBERTS: He needs to change his tape.

12 THE WITNESS: Okay.

13 THE VIDEOGRAPHER: We're off the record at
14 2:30 p.m. End of Tape 2 -- Tape 1. Sorry.

15 (Recess from 2:30 p.m. to 2:44 p.m.)

16 THE VIDEOGRAPHER: Stand by. On the record at
17 2:44. Beginning of Tape 2.

18 MR. WOMMACK: Mr. Roberts.

19 MR. ROBERTS: Yes, sir.

20 MR. WOMMACK: My client needs -- wants to
21 explain and change his testimony. And he read the next
22 definition that you didn't read to him in this, and he asked
23 me to make a -- print up the law, which I did, and he's read
24 it. He would like to change his testimony.

25 MR. ROBERTS: Okay. If -- let me see here

1 just a second.

2 THE WITNESS: That's the general conditions.
3 That's Exhibit 4.

4 MR. ROBERTS: Right. 42 U.S.C. 6903.

5 (Plaintiff's Exhibit No. 5 was marked for
6 identification.)

7 A Under definition 23, general conditions of the
8 contract, it says: "The term 'Hazardous waste' shall have
9 the meaning provided in Section 1004 of the Solid Waste
10 Disposal Act 42 U.S.C., Section 6903 as amended from time to
11 time."

12 I had our counsel pull up 42 U.S.C. A 6903, and under
13 Item 5: "The term 'hazardous Waste' means a solid waste, or
14 combination of solid wastes, which because of its quantity,
15 concentration, or physical, chemical, or infectious
16 characteristics may" -- under Item B -- "pose a substantial
17 present or potential hazard to human health or the
18 environment when improperly treated, stored, transported, or
19 disposed of, or otherwise managed."

20 And in my opinion, like that, chemical lime, especially
21 in powder form, meets that definition.

22 Q Okay. Let me ask you a couple of questions about
23 that. In Paragraph 5, that you referred to, you read that
24 "hazardous waste means a solid waste or combination of solid
25 wastes." And then it's qualified there by something:

1 "Which because of its quantity, concentration, or physical,
2 chemical, or infectious characteristics may" -- and then you
3 jump down to B -- "pose a substantial present or potential
4 hazard to human health or the environment."

5 A Also under 5-A --

6 Q I have a couple of questions about that.

7 A Okay. I'm sorry.

8 MR. WOMMACK: Let him ask the questions.

9 Q (By Mr. Roberts) Do you have any indication of the
10 quantity of lime that was leaving the property?

11 A No, I have no indication of the concentration of
12 lime that -- that was on the adjacent property. I only have
13 the word of the property owner; that his employees were
14 complaining of irritants to the eye and to the respiratory
15 system.

16 Q And can dust cause irritation to your eyes?

17 A Yes.

18 Q Just plain old dirt dust?

19 A Yes, it can cause dust. Yes, it can cause an
20 irritant. But we're talking about using chemical lime to
21 treat material that is at such a moisture content that
22 there's no other physical -- there's no other chemical way
23 to dry it; and if the material has a moisture content that's
24 somewhere more than 3 percent over the optimum, there will
25 be no dust. There's no way to have dust.

1 You're talking about material that's beyond the optimum
2 moisture content. And in most cases, it's -- it's many
3 percentage points over the optimum moisture content. Once
4 you go past the optimum moisture content, you basically
5 start getting it to the point where the moisture content of
6 the soil, it has more moisture than it can hold.

7 When you start physically compacting that, you release
8 moisture from it. Either you release it by -- you release,
9 it and it either dries normally through air; or it dries
10 chemically, which is why we use the lime.

11 So, the material that was being placed out there, the
12 excavated material, if it was being treated with -- with --
13 with lime to chemically dry it, there's no way it could
14 produce a dust cloud. The only dust can be from the lime.

15 Q Okay. And what I'm trying to determine is, the
16 term "hazardous waste," and that's the one you're relying on
17 now after our break?

18 A Basically under -- under -- under U.S.C. 69 --
19 U.S.C. 6903, the term "hazardous waste." And in my opinion,
20 like that, that the -- that the -- that the lime -- that the
21 lime basically caused -- is a hazardous material.

22 Q All right. Now, let me ask you, then, let's talk
23 about this United States Code. After the word "hazardous
24 waste," it means a, "what"?

25 MR. WOMMACK: Object to the form of the

1 question.

2 Q (By Mr. Roberts) Does it mean a solid waste?

3 MR. WOMMACK: Excuse me. I object to the form
4 of the question. You're asking him about a law.

5 Q (By Mr. Roberts) I'm asking you --

6 A It means a number of things. It means a solid
7 waste or a combination of solid waste which, because of its
8 quantity, concentration, and so on.

9 Q Right. Let's look at the definition of solid waste
10 or combination of solid waste. And if you'll turn to
11 definition No. 27. Let's look what this particular
12 regulation is written about.

13 MR. WOMMACK: Object to the form of the
14 question. Do you have another one of these laws that you
15 were hiding out on us?

16 MR. ROBERTS: I thought you printed one. Let
17 me get you one.

18 MR. WOMMACK: Well, I gave it to my client.
19 You obviously anticipated its use.

20 A Is there a question?

21 Q (By Mr. Roberts) Yes, sir, after you've had a
22 chance to read it.

23 A Go ahead.

24 Q Does it define in Paragraph 27, 42 U.S.C. Section
25 6903, the term "solid waste"?

1 A Yes, sir, it defines it.

2 Q Well, let me ask you a series of questions here
3 about the way it's defined.

4 Is what was going out on the site that day garbage?

5 A No, sir.

6 Q Is it refuge?

7 A No, sir.

8 Q Is it sludge from a wastewater treatment plant?

9 A No, sir.

10 Q Is it a water supply treatment plant?

11 A No, sir.

12 Q Or an air pollution control facility?

13 A No, sir.

14 Q Is it other discarded material, including solid
15 liquids, semi-solid or contained gaseous material resulting
16 from industrial, commercial, mining, and agricultural
17 operations?

18 MR. WOMMACK: I'm going to object to the form
19 of the question.

20 A It's not a discarded material, but it is a material
21 from a commercial mining -- commercial -- lime is
22 commercially mined, if we want to get -- if we look at it --
23 look at it that way.

24 Q (By Mr. Roberts) So, we're in a mining operation
25 now?

1 A If we go back -- if we go back to the M.S. --

2 MR. WOMMACK: Chhh, chhh. I'm going to object
3 to the whole series of questions on what this law means.
4 This law means what this law means. You already tricked him
5 once by not giving him the second definition.

6 MR. ROBERTS: I didn't trick him, Counsel.

7 MR. WOMMACK: And you didn't read community
8 activities then. You stopped at mining operations. So, I'm
9 gonna -- I want a running objection.

10 MR. ROBERTS: I'll add community activities.

11 MR. WOMMACK: I want a running objection on
12 anything -- he's not a lawyer. You're asking him to tell
13 you what the law means. You're a lawyer. You ought to know
14 what the law means.

15 Q (By Mr. Roberts) Did you rely upon this law, as you
16 understood this law?

17 A I understood that the -- that the lime dust was
18 causing -- was causing a health hazard to an adjacent
19 property owner, and that's why I -- I agreed with the --
20 with the stoppage to the use of lime, until they could
21 correct the problem -- until the contractor could correct
22 the problem.

23 Q Now, let's talk about the evidence of a health
24 hazard from the lime.

25 A Okay.

1 Q Watering eyes?

2 A Correct.

3 Q And what is your tie to the lime as opposed to the
4 dirt portion, or anything else, that might have blown over
5 onto the other property?

6 MR. WOMMACK: Objection to the form of the
7 question.

8 A The material that I saw over there on Freeport
9 Launch's property was a white deposit. We have no white
10 dirt on the site. The only white material that could have
11 blown over there in a cloud form was lime.

12 Q (By Mr. Roberts) Now, let's start -- talk about
13 that. How many times did you go to Freeport Launch?

14 A I was over there, during the project site, for this
15 specific item here, I think once; but I was over there
16 probably three or four other times for other business
17 purposes.

18 Q And when you were over there on the one time you
19 were there for business purposes, what did you see?

20 A There was some lime dust on one of the vessels out
21 there. This was sometime late, I believe it was, in 2007.

22 Q Okay. What occasioned you to be there that day?

23 A When I got a call from -- when I got a call from
24 John Haas about the -- about the lime dust depositing on
25 some of the vessels out there.

1 Q And what was the remedy that was done to fix that
2 problem?

3 A The contractor changed his means and methods of
4 placing the lime. He either placed it early in the morning
5 when the winds were -- when the wind velocity was very, very
6 low; or he waited until the wind was out of the proper --
7 out of -- out of -- out of the north so that -- so that any
8 -- any -- any lime dust blew out into the harbor rather than
9 onto the adjacent property owner.

10 Q And did you give him that opportunity to correct it
11 when it was stopped by -- in April of 2008?

12 A In April of 2008 we were threatened by or informed
13 by the adjacent property owner that he was going to notify
14 the authorities, and I felt that was not good for any of us,
15 the owner or the contractor.

16 Q Would you consider them to be the professionals
17 that we talked about in that contract provision earlier
18 about consulting with professionals about what to do about a
19 problem once you stop the contractor?

20 MR. WOMMACK: Object to the form of the
21 question.

22 A No, sir.

23 Q (By Mr. Roberts) You don't consider the folks that
24 would come out on behalf of the state as professionals?

25 A Not regulatory agencies, no, sir.

1 Q None of them?

2 A I couldn't put them all in the same basket, no,
3 sir.

4 Q Have you ever had anybody from Air Quality Control
5 or TCEQ at your premises?

6 A Yes, sir.

7 Q And is that the basis of your determination about
8 their professionalism?

9 A No, sir.

10 Q What is?

11 A Just personal opinion.

12 Q Did you have -- do you have any pictures?

13 A Any photographs?

14 Q Yes, sir, any photographs of this lime dust?

15 A On the adjacent property?

16 Q Yes, sir.

17 A No, sir.

18 Q Have you heard of anybody that has any pictures?

19 A Not to anybody, no, sir, I haven't.

20 Q When the use of lime in late April started again,
21 do you know whether the contractor talked to Freeport
22 Launch?

23 A I don't know if he did or not, no, sir.

24 Q Did you have anymore calls from Freeport Launch?

25 A No, sir.

1 Q After the first time in 2007, did you have anymore
2 calls that you brought to the attention of the contractor
3 between that incident and the one in April 2008?

4 A I recall there were three instances, two of them
5 that I brought to the attention of my inspector. The third
6 one, by the time I had called my inspector, he had already
7 been informed of it, and I believe my inspector and
8 representative from the contractor went over to Freeport
9 Launch.

10 Q Okay. And that would be the time that is involved
11 in the month of April, 2008 when the actual directive to
12 stop using lime and stockpiling material was given?

13 A The directive was given to stop using lime. The
14 directive to stockpile the material was an effort to go
15 ahead and allow the contractor to try to still make progress
16 during that time period. We could look at other
17 alternatives to the use of lime.

18 MR. ROBERTS: If you'll mark this our next
19 exhibit, please?

20 (Plaintiff's Exhibit No. 6 was marked for
21 identification.)

22 THE WITNESS: Did you give me a five and six?
23 Is that what this is? I've got two of them here; five and
24 six.

25 MR. ROBERTS: These aren't the same thing. We

1 haven't talked about five yet.

2 THE WITNESS: Okay.

3 MR. ROBERTS: Five is the 218-70077-40 report
4 of construction activities by Don Cheline.

5 MR. WOMMACK: Did you give me a copy of it?

6 MS. WITTE: We haven't introduced it yet.

7 MR. ROBERTS: I haven't introduced it. I've
8 got it right here.

9 MR. WOMMACK: Do you want to hold it until --

10 MR. ROBERTS: I'm going to get to it in a
11 minute, but I'll go ahead and give it to you.

12 Q (By Mr. Roberts) Can you tell us what Exhibit 6 is?

13 A Exhibit 6 is an e-mail from myself to William
14 Goldston, dated Wednesday, April 23rd, 2008, a copy to
15 Joseph Scarborough, Jerry Thibeaux, Don Cheline, Linda
16 Matcheski. Subject being "RLB Request."

17 Q All right. Does that kind of -- there's an
18 itemization down one side there where it says: Item 1, Item
19 2, Item 3, Item 4, et cetera.

20 Is that kind of your way of going through a list of the
21 things that were those issues that may still be pending that
22 you're talking about in the first paragraph?

23 A These items were in no particular order of
24 importance. They were based on a conversation I had in my
25 office, a meeting in my office with Don Cheline to go over

1 some of the issues that were outstanding to try to get some
2 of these resolved.

3 Q Okay. Let's talk about Item 1: Addition of a
4 2-inch waterline and meter for use by Kirby Marine,
5 8,425.50. That was a proposal that you got from RLB to lay
6 that particular waterline?

7 A That's correct.

8 Q And y'all -- I notice that there's some handwriting
9 there beside that. Is that your handwriting that says
10 "reject"?

11 A No, sir.

12 Q Do you know whose that is?

13 A No, sir. I don't recognize it.

14 Q But, in fact, that was rejected, wasn't it?

15 A The installation of the 2-inch waterline and the
16 meter, I -- I don't recall if that was rejected. I think it
17 was, but I -- I -- I can't say that for certain.

18 Q Okay. But what you -- did you feel the Port should
19 pay for that?

20 MR. WOMMACK: Object to the form of the
21 question.

22 A I think it was that -- this was -- this was for one
23 of our tenants, for Kirby -- Kirby Marine.

24 Q Yes, sir.

25 A And I don't recall right now if our discussion on

1 this was to go ahead and have -- basically pose this
2 question to Kirby whether they wanted to pay for it or not.

3 Q All right. Let's go on down, and I want to talk to
4 you about the -- the deletion -- Item No. 5: "Deletion of
5 lime and air-drying of 75,000 cubic yards."

6 Can you tell us what that's about?

7 A I believe this had to do with the stockpiling of
8 the material following the incident in early April with the
9 lime going onto the adjacent property.

10 Q And what are you trying to say in Item No. 5 when
11 you're doing this e-mail? I don't understand.

12 A This was a proposal, I believe, from the
13 contractor; that following the incident early in April with
14 the lime dust going on the adjacent property, that we had to
15 ask the contractor to look at some other options. We looked
16 at, I understand -- we talked about earlier possibly using
17 hydrated lime, or a lime slurry, or possibly flyash; and
18 during the interim was to stockpile the material so we could
19 at least go ahead and keep -- keep moving forward with the
20 excavation. Maybe not with the placing and the actual
21 compaction of the excavated material. And I don't have all
22 the details behind this, but I believe this -- this
23 pertained to a proposal that was submitted by the contractor
24 to provide us with a -- with a -- with a very, very small
25 credit to air-drying of the material but an increase in

1 almost somewhere between three and four months of the
2 contract time to air-dry the material.

3 Q And then you're apologizing there to -- to
4 somebody.

5 A That's correct.

6 Q "I apologize, but this does not rise to the level
7 of comment."

8 A That's correct.

9 Q And you're telling that to Mr. Goldston?

10 A That's correct.

11 Q And copying all people associated with the Port,
12 the engineering, but not the contractor.

13 A That's correct.

14 Q And here it says it requires the use of chemical
15 lime as a drying agent. The owner agrees to pay for it.
16 Was that what was communicated to the contractor?

17 A What was communicated to the contractor was,
18 "Please instruct the contractor to comply with the contract;
19 and if that requires the use of chemical lime as a drying
20 agent, the owner agrees to pay for it."

21 And that's what's stated in this -- in this e-mail.

22 Q Okay. And this is April 23rd?

23 A Yes, sir.

24 Q Can you tell us why it took until April 30th to
25 communicate this to the contractor?

1 MR. WOMMACK: I object to the form of the
2 question.

3 A I can't answer that. I don't know. It was seven
4 days with the weekend in between. I really can't answer why
5 it took seven days to get the answer to the contractor.

6 Q (By Mr. Roberts) Okay. Who did you think was going
7 to convey this information to the contractor?

8 A The end of this e-mail says: "Please review my
9 comments and then let's talk." I don't recall the -- the
10 response that I received back from the engineer on this and
11 what the final resolution was. These were my
12 recommendations to the engineer for consideration, or at
13 least my comments and thought on some of the issues.

14 Q Okay. And you wrote that in response to an e-mail
15 that he had written to you about 10:19 a.m. on April
16 23rd, 2008. "Do you have time to discuss the RLB proposal,
17 or do you want to wait?" Is that what prompted this e-mail,
18 then, to go back to him at 2:11 p.m.?

19 A This was part of it. I don't recall exactly what
20 the RLB proposal was that he refers to, if it was just a
21 single item, or if it was all of these items.

22 Q He talks about the RLB proposal, and do you know
23 how long you had had that proposal?

24 A I'm not --

25 MR. WOMMACK: Object to the form of the

1 question.

2 A I'm not sure which proposal he was talking -- he's
3 referring to here.

4 Q (By Mr. Roberts) Would you expect the contractor to
5 do anything other than stop using lime and stockpiling
6 material until such time as you did communicate to them, or
7 someone in your organization or under your control gave this
8 information to the contractor?

9 MR. WOMMACK: Object to the form of the
10 question.

11 A I don't understand what you're asking. I'm sorry.

12 Q (By Mr. Roberts) Well, you wouldn't expect him to
13 start early if you didn't give him the message until the
14 30th, would you?

15 MR. WOMMACK: Object to the form of the
16 question.

17 A The contractor had his -- had his means and
18 methods. I mean, he -- we were not responsible for his
19 means and methods.

20 Q (By Mr. Roberts) Stockpiling didn't get into his
21 means and methods?

22 A We basically told him that -- we suggested that he
23 go ahead and stockpile the material, to keep moving forward
24 with the excavation while the issue with the lime dust could
25 be resolved. His initial -- his initial response was, "I

1 cannot put down" -- "I cannot put down pelletized lime
2 without causing a dust cloud." That was his initial
3 response.

4 Q And that's dust cloud, period?

5 A Dust cloud, period. And then after -- after all
6 this was said and done, and he proceeded to use lime early
7 in May, he managed to find the methods to put down the lime
8 without causing dust clouds, and we had no further
9 complaints from adjacent property owners.

10 Q Or at least dust clouds that didn't get over onto
11 adjoining property?

12 A We had -- we had no complaints from adjoining --
13 adjacent property owners.

14 Q Okay. I want to go back to that Exhibit No. 5, I
15 believe, now: Report of Daily Construction Activities, July
16 25, 2007, and that's sent to Mr. Don Cheline.

17 A Okay.

18 Q What was the condition of the work site on July the
19 25th, 2007?

20 MR. WOMMACK: Object to the form of the
21 question.

22 Q (By Mr. Roberts) According to this report.

23 A It says, "The west end of Fill Area No. 1, both
24 north and south, has approximately 1 inch of water standing
25 on it." And the only thing I see in here is reference to

1 Fill Area No. 1.

2 Q All right. What I'm wondering is, from an
3 engineering standpoint, can you tell us what the PSI
4 representative could have been trying to tell the Port about
5 the risk of losing some strength was worth the gamble in
6 view of the weather forecast?

7 A I don't know what he meant by that.

8 Q What does the use of lime or the overuse of lime,
9 if you were to overuse lime, do to the stability of clay?

10 A From my understanding it has -- it doesn't -- the
11 affect doesn't have a negative impact on the stability of
12 the clay. It -- it -- it will dry the moisture content
13 where it's below the -- the allowable range in accordance
14 with the specifications.

15 Q Will it do anything to the plasticity?

16 A The overuse of clay?

17 Q Of lime.

18 A I'm sorry. The overuse of lime, I couldn't say
19 just what that would do to the plasticity if you exceeded
20 some theoretical percentage.

21 Q Now, the next paragraph talks about: "This is not
22 what the PSI representative requested." Do you see where
23 that starts?

24 A Uh-huh, Yes, sir.

25 Q "Nor what the specification require, and not what

1 the RLB field and compaction submittal indicates." What is
2 he talking about there?

3 A It appears that he's talking about -- that there's
4 a solid mass of water from north edge to south edge and west
5 end to the construction fence in Fill Area 1.

6 Q Wasn't that a particularly rainy time of the year?

7 A Yes, sir.

8 Q And what was that doing to the schedule?

9

10 A It could possibly set the schedule back.

11 Q In fact, he says, "is" just setting the schedule
12 further back, doesn't he?

13 A He says, "This failure is just setting the schedule
14 further back." And I think he's -- well, I don't want to
15 read between the lines or try to suppose what he was trying
16 to say here other than if there's a solid mass of water on
17 top of the fill, then -- then the fill site was not left in
18 a drainable [sic] condition.

19 Q Why does he say, "forcing the use of lime," in your
20 opinion as an engineer?

21 A All I can do is try to -- try to -- try to suppose
22 what he had to say here. I mean, I couldn't answer that. I
23 don't know. I mean, there's a couple of different reasons
24 why he could have said that.

25 Q Okay. Well, forcing the use of the lime is what I

1 wanted to focus on. I thought there was no limitation
2 against what you told me earlier to use the lime.

3 A If the material is brought in to -- if the material
4 is brought in at the proper moisture content and compacted
5 and is not sloped where it will drain and you get a
6 significant amount of rainfall, the water ponds on it. You
7 reintroduce the water back into it, and you lose your
8 density. That's the way -- that's the way clay works; your
9 cohesive soils. And if you do that, then you -- then you
10 have to go back in, and you have to -- you have to either
11 mechanically or chemically alter that soil to get the
12 moisture content back down to within an acceptable range.

13 One of those methods is to go back in there even though
14 the material may have been at the right moisture content to
15 start with, and you got density. If you didn't drain it --
16 if you didn't slope it where it would -- where it would --
17 where it would drain and you reintroduce moisture into it,
18 you could lose your density. Then you -- you possibly could
19 have to be forced, as he's saying here, to use lime to
20 chemically dry it.

21 Q And we're talking really a failure of the soil as a
22 compacted --

23 A No, sir. A failure -- a failure of the contractor
24 to go ahead and leave the site in the condition where the
25 rainwater wouldn't sit there and pond.

1 Q Result in a failure of the soil as he left it?

2 A Results in a failure of the soil as he left it,
3 correct.

4 Q Do you have any idea why there were so many
5 discussions during the course of this contract about using
6 less lime, drying it without lime, this type thing?

7 MR. WOMMACK: I object to the form of the
8 question.

9 A I don't recall any discussions about limiting the
10 contractor's use of lime.

11 Q (By Mr. Roberts) Well, didn't you ask for a
12 proposal at one time to dry -- to dry the material
13 mechanically versus with lime?

14 A Even before we started the project, yes, sir.

15 Q Right.

16 A Yes, sir, we did. To look at a cost savings.

17 At that time, we were looking at a -- a potential client
18 that wanted to expedite the project, which was the reason
19 why we elected to go ahead and put the bid package out with
20 the use of lime as a chemical drying agent to shorten up the
21 time and pay it. You either pay -- I mean, time is money.

22 But then we also -- but when I saw the numbers that came
23 in, I went back and I felt: Let's look at it. What would
24 it be if we mechanically dried it? How much longer would it
25 take, and how much would we save?

1 And the proposal I got back from the contractor, I felt
2 it was not justified for the small amount of savings for the
3 additional time it would take --

4 Q Right.

5 A -- to mechanically dry.

6 Q And I think we've covered that.

7 A Yes, sir.

8 Q "Time is money." That's an interesting statement.
9 Is "time is money" limited to the Port?

10 A No, sir.

11 Q So, if it takes the contractor longer to do
12 something because there's extra yardage to move, for
13 example, from 365,000 yards to 418.818 yards -- that would
14 be 418,818 yards of dirt to move, does that indicate that
15 the contractor ought to get some time for that extra
16 yardage?

17 MR. WOMMACK: Objection to the form of the
18 question.

19 A Possibly.

20 Q (By Mr. Roberts) Did the contractor get any time?

21 MR. WOMMACK: Objection to the form of the
22 question.

23 A The contractor requested time; but at that time,
24 the contractor was not -- was not willing to entertain any
25 additional change orders. He wanted everything to go to a

1 final settlement.

2 Q (By Mr. Roberts) Well, in fact, on the change order
3 that you sent him, it had some days, and if he would have
4 accepted that change order, isn't it a fact that he would
5 have been stuck with those days then?

6 A That change order --

7 MR. WOMMACK: Objection to the form of the
8 question.

9 A That change order was subsequently changed like
10 that to put down in there like that for increase or decrease
11 in contractor's time to be determined, in order to go ahead
12 and pay the contractor the money that we felt we still owed
13 him.

14 Q And that money's still in dispute, also, isn't it?

15 MR. WOMMACK: Objection, form of the question.
16 I don't know about --

17 A You're talking about Change Order No. 9?

18 Q (By Mr. Roberts) I'm talking about the dispute on
19 any monies due to the contractor at this point, or what this
20 lawsuit is all about.

21 MR. WOMMACK: Objection, form of the question.

22 Q (By Mr. Roberts) Is that correct?

23 A It's -- yes the funds are still in dispute.

24 Q Okay. Now, was this the -- was this the same -- I
25 understand that y'all had some kind of a bond issue down

1 here to do some work at the Port?

2 A We had a bond issue, but I'm not that well -- well
3 versed on that subject.

4 Q Well, don't you have to come up, as the engineer,
5 with what the subject of the bond issue is going to be, what
6 it's for?

7 A I -- I can't answer that.

8 MR. WOMMACK: Objection to the form of the
9 question.

10 THE WITNESS: I'm sorry. Excuse me.

11 Q (By Mr. Roberts) You don't have any idea whether
12 this project was included in that bond issue.

13 MR. WOMMACK: Objection to the form of the
14 question.

15 A The bond issue covered this project. I don't know
16 whether it covered any funds for this contract or not.

17 Q Did the bond issue pass or fail?

18 A It was -- it was not a bond issue that was voted by
19 the taxpayers.

20 Q They didn't vote on it, or they didn't vote for it?

21 A It was not ad valorem tax bond issue. It was a
22 revenue bond issue.

23 Q And so there was never an election by the people
24 concerning whether they wanted to approve or disapprove this
25 project?

1 A The only thing I can state, it was an ad valorem
2 tax bond issue -- and it was not an ad valorem tax bond
3 issue. It was a revenue bond issue.

4 MR. WOMMACK: Again --

5 Q (By Mr. Roberts) Did or did that not have to be
6 voted on by the people initially?

7 MR. WOMMACK: Objection to the form of the
8 question.

9 A I don't know. I don't -- I don't believe it had to
10 be voted on by the -- by the taxpayers.

11 Q (By Mr. Roberts) So, this particular project was
12 never presented to the taxpayers in general.

13 MR. WOMMACK: Objection to the form of the
14 question.

15 Q (By Mr. Roberts) To vote on?

16 A Not to my knowledge.

17 Q Okay. And so you were able to do this internally
18 by issuing revenue bonds, as your understanding of what
19 happened?

20 A There was a revenue bond issue that was presented.

21 Q All I want is your understanding.

22 A There was a revenue bond issue presented. Now,
23 what it all covered, I'm not sure.

24 Q Presented to who?

25 MR. WOMMACK: Objection to the form of the

1 question.

2 A There was a revenue -- excuse me. Let me correct
3 that. There was a revenue bond issue that was approved by
4 the Board of Commissioners.

5 Now, how much or what of those funds went towards this
6 particular project, meaning the Velasco Terminal Project, I
7 don't know.

8 Q (By Mr. Roberts) Okay. Who would be the best
9 person to ask about that?

10 A Phyllis Saathoff, the Managing Director or
11 Mr. Reixach, Executive Port Director.

12 Q Were you here for his deposition?

13 A Yes, sir.

14 Q I didn't get the impression that he knew much about
15 the details of what goes on at the Port out there.

16 MR. WOMMACK: I object to that comment, since
17 it isn't a question.

18 Q (By Mr. Roberts) Did you get the same impression?

19 A Mr. Reixach is my -- is -- is -- is my senior
20 supervisor, sir. And I would like -- I would not like to
21 make any response to that question.

22 Q Fair enough. Now, did you hear him say that his
23 primary duties deal with Washington?

24 A I believe that's --

25 MR. WOMMACK: Objection -- objection to the

1 form of the question.

2 A I believe that's what he said.

3 Q (By Mr. Roberts) Who set the specs at the digging
4 out in the water where you're going down to a certain level,
5 that you could have a tolerance and be paid for up to 6
6 inches below that?

7 MR. WOMMACK: Object to the form of the
8 question.

9 Q (By Mr. Roberts) Do you know who was responsible
10 for that decision to put that portion of the contract in
11 there?

12 A I believe it was the engineer's recommendation.

13 Q Do you know what the industry standard is normally
14 when you're doing that out in the water?

15 A In the 27 years I've been at the Port, we've gone
16 anywhere from a -- anywhere from as much as a 2-foot
17 allowable over depth.

18 Q Yes, sir.

19 A To as little as 4-inches allowable over depth.

20 Q Okay. Do you have any knowledge about the work
21 that was deleted from the RLB contract?

22 A I have knowledge of some of -- pretty much all the
23 work that was deleted, yes.

24 Q Who would make those decisions of what to delete?

25 A I would make the recommendation to the board in

1 consult with the engineer.

2 Q Okay. And I want to talk about some of those
3 deletions. There was changes of the fertilizer and seeding
4 quantities; is that correct?

5 A That's correct.

6 Q Bid Item No. 3, I believe, was styled "Permanent
7 hydromulching of erosion control grasses in the backlands
8 area."

9 Are you familiar with what I'm talking about?

10 A Yes, sir.

11 Q The contract called for how many acres of that to
12 be fertilized and seeded?

13 A I don't remember the exact acreage.

14 Q Well, let me help you out a little bit here. We'll
15 get you a contract in front of you.

16 MR. ROBERTS: I would like to mark Article 4,
17 Contract Price, as our next exhibit, which I believe is
18 seven.

19 MR. WOMMACK: Excuse me. We don't have to go
20 off the record, but did Dillon Walker, from my office, get a
21 copy of the contract?

22 MR. ROBERTS: Yeah. I'm just going to talk
23 about the one page, but you get the whole thing. We can go
24 off the record.

25 THE VIDEOGRAPHER: We're off the record at

1 3:27 p.m.

2 (Plaintiff's Exhibit No. 7 was marked for
3 identification.)

4 (Recess from 3:27 p.m. to 3:29 p.m.)

5 THE VIDEOGRAPHER: On the record at 3:29.

6 Q (By Mr. Roberts) Have you had an opportunity to
7 look over what the court reporter has marked as Exhibit
8 No. 7?

9 A Yes.

10 Q Now, I want to talk about deletions from the
11 contract a little bit now; kind of shift gears here.

12 I notice that this contract is a combination of lump-sum
13 work and unit prices.

14 A Correct.

15 Q First of all, let's talk about if you delete
16 something from the lump-sum contract. How do you go about
17 doing that? What do you do? Like the road, for example.
18 It's -- it's not listed here. It's just one of these areas.
19 How do you determine what the contractor is going to get for
20 the deletion of the roadway? Are you familiar with that?

21 A I believe the general conditions --

22 MR. WOMMACK: Object -- object to the form of
23 the question.

24 A I believe the general conditions address how -- how
25 you -- how you calculate the changes in lump sum prior

1 items. I don't recall the exact language.

2 Q (By Mr. Roberts) Okay. Did you do that on the
3 roadway?

4 MR. WOMMACK: I'm going to object to the form
5 of the question.

6 A I'd have to recall exactly what we did on the
7 roadway. I believe that we requested that the contractor
8 delete that, and we asked for a revised price.

9 Q (By Mr. Roberts) And did he give you a revised
10 price?

11 A Yes, he did.

12 Q Do you recall what that was?

13 A No, sir, I don't.

14 Q Now, did you come back with a different revised
15 price?

16 A I believe I did, yes, sir.

17 Q Do you recall whether or not that might have been
18 in the neighborhood of \$20,000?

19 A I don't recall.

20 Q How -- okay. My able-body associate here has
21 pointed out that I may have mistaken.

22 There was a \$20,000 reduction, if you'll assume that for
23 me for a minute, proposed by RLB and a \$50,000 reduction
24 proposed by the Port, if you'll assume that.

25 Who would have calculated that number?

1 A I don't recall if I calculated it or if the
2 engineer calculated that or if it was a joint effort between
3 myself and the engineer.

4 Q Okay. What is the -- what is the basis, if you can
5 tell me that? There must be something that you're looking
6 at because I don't see anything in the contract bid that
7 would say, "Road, \$50,000."

8 A That was part of a -- part of a lump sum, I
9 believe, bid item.

10 Q Yes, sir, it was.

11 A Yeah. Which is not -- this is part of the
12 agreement, not part of the bid proposal. So, it doesn't
13 show up on here. I believe the contractor came back and
14 showed us how he calculated his \$20,000 deduct, I think, by
15 talking about different pieces of equipment, number of days
16 that they will be used, the number of -- basically the
17 equivalent, either day rate or hourly rate, and then also a
18 credit for materials that would not be used and not have to
19 be ordered, and I compared that to what it would have cost
20 me to have that road built by, say, another contractor and
21 buy the materials.

22 Q Would you -- would that be fair to say it would be
23 a cost to you?

24 A Right.

25 Q In other words, if this guy isn't going to build

1 it, then the reduction ought to be what it cost to build it
2 by somebody else with materials.

3 MR. WOMMACK: I'm going to object --

4 Q (By Mr. Roberts) If I heard you correctly.

5 MR. WOMMACK: I'm going to object to the form
6 of the question.

7 A General conditions outlines in there, there's
8 certain things that the contractor is, I guess, entitled to?

9 Q (By Mr. Roberts) Yes, sir.

10 A That would be above and beyond costs, as far as
11 overhead. But I don't recall exactly what the general
12 condition states on that.

13 Q Can I use the word "cost," then?

14 MR. WOMMACK: Object --

15 Q (By Mr. Roberts) To talk about this?

16 MR. WOMMACK: Object to the form of the
17 question.

18 Q (By Mr. Roberts) I'm -- I'm trying to identify
19 because I'm going to ask you some other questions about some
20 other things.

21 A Well, I'm -- I'm just --

22 Q How do you refer to it?

23 A I'm just confused when you start talking about
24 costs; talking about contractor's costs or what it costs me,
25 or what it costs the contractor. That's -- that's different

1 because what it costs the contractor from a subcontractor,
2 he's got markup on that; and I really don't care about that.
3 What I look at is what is it going to cost to me.

4 Q Right.

5 A Or if I deduct it, what kind of credit am I going
6 to get and then what the general conditions call for. Do
7 the general conditions allow for him? If he can prove that
8 he has overhead, or something like that, that he's included
9 in there, I can't -- I can't really define -- you know, your
10 definition of cost is, at least for me, a little bit too
11 vague.

12 Q Okay. And that's what I would like to find out,
13 then, specifically. If you need a minute to look in the
14 contract here, I don't have a problem with you taking a
15 minute to look in the contract; but you went through some
16 formula to come up with your \$50,000, and I thought I heard
17 you say it was the cost to get somebody else to do the work
18 plus the material?

19 A That's correct. While this --

20 Q And that's -- go ahead. Sorry.

21 A While this project was going on, we were doing
22 other work inside the Port. In other words the Port -- the
23 Port was acting -- basically acting as the contractor,
24 basically hiring day-rate equipment, buying materials and so
25 on; and I used some of those rates that we had, and I came

1 back with a number.

2 Q Okay.

3 A And I said, this is what I felt we should be
4 getting for a credit for the deduction of this work.

5 What the contractor come back with, as you can see
6 there, if you're talking about 50 versus \$20,000 credit, I
7 mean, that's a substantial difference. More than
8 substantial.

9 Q And that's because you didn't have any -- any way
10 to do it accept to follow this contractual provision, which
11 you say would be cost plus materials, basically?

12 A I'd have to go back and read the general
13 conditions. I don't remember exactly. It -- it outlines in
14 there basically changes in the contract price, whether it's
15 unit price or whether it's lump-sum price, and there's
16 procedures.

17 Q Did you ever ask the contractor for a breakdown of
18 his lump-sum bid?

19 A No, sir.

20 Q Now, had you have asked for that, would you have
21 been able to see what that number was?

22 A If I had asked for that breakdown as part of the
23 bid process, yes.

24 Q Yes, sir. The general conditions and the general
25 overhead and some of the other things that -- that are out

1 here that cost the contractor, such as the home office
2 portion of process and payroll, taxes, insurance, all the
3 overhead things that they have, doesn't that somehow have to
4 be built into this contract?

5 MR. WOMMACK: Objection to the form of the
6 question.

7 A You're talking about adjustments for that. General
8 conditions address that as to what -- what he can claim and
9 what he cannot claim.

10 Q (By Mr. Roberts) Right. And you never had asked
11 the contractor for that under oath today? You're saying
12 that?

13 A For a breakdown of the -- the various; lump-sum
14 items in his bid proposal?

15 Q Of his lump-sum item, yes, sir.

16 A His lump-sum items? No, sir.

17 Q Now, let's go to some of the items that -- the
18 first one that I want to talk about is on the 365,000 up to
19 408, I think we've pretty well covered that already.
20 Let's go down to No. 2. And the second item in the
21 description there is, "Removal, stockpiling, and replacement
22 of the top 6 inches of topsoil from backlands area of the
23 site."

24 How many acres were -- was the contractor bidding on at
25 this time that this estimate was done?

1 A Seventy-three acres.

2 Q How much did you actually have the contractor do at
3 that time?

4 A I think it was about 10 percent of that.

5 Q How about seven acres?

6 A Okay. Seven acres.

7 Q If I told you mathematically that's actually 9.6
8 percent -- I'm sorry -- that he did and about 90.4 percent
9 you deleted, would you consider that a material change?

10 A Yes, sir.

11 Q That would be pretty substantial, wouldn't it?

12 A It's a material change.

13 Q Is it substantial?

14 A It depends upon how you define -- define
15 substantial.

16 Q Well, that's a word y'all use in your contract.

17 A All right. Ninety percent -- 90-percent deletion
18 of a line item would be substantial.

19 Q Okay. Would it be -- I'm sorry. Would it be
20 significant? Not substantial. That's the word you actually
21 use in your contract, "material and significant."

22 A The contractor does not define that. In my
23 personal opinion I would have to say, yes, it's significant.

24 Q Okay. Was -- after this deletion, was there any
25 other corresponding adjustment with respect to that item of

1 work, or giving them anymore work somewhere else, or
2 offsetting it in any other way?

3 A Offsetting it in any other way, no, not to my
4 recollect.

5 Q Okay. How did you determine what you were going to
6 pay for?

7 A He removed and stockpiled seventy-three acres of
8 topsoil.

9 Q Okay.

10 A Because of the conditions of the site of the
11 contracts and other contractual negotiations the Port had
12 going on. It was our -- it was our decision not to replace
13 the 65 acres, 66 acres of topsoil to leave it in the
14 stockpile condition.

15 We had proposed to go ahead and pay him half of the unit
16 price to remove the stockpile, the material; and then pay
17 him -- pay him half of that -- half of that \$3,000 per acre
18 to go ahead and remove it and stockpile it, and then pay him
19 -- pay him the full \$3,000 an acre for the, I think it was,
20 7 acres where we not only removed and stockpiled, but also
21 replaced the top 6 inches of topsoil.

22 Q Now, your description here says, "Remove, stockpile
23 and replace."

24 A Correct.

25 Q That seems to me to be three items. What are you

1 going --

2 A Well, you've actually got "remove," "stockpile";
3 and then you go back and pick it up out of the stockpile and
4 replace it. So, you've got the two operations. One of them
5 -- the removing and the stockpile is done at the beginning
6 of the project where you're taking it from the stockpile,
7 transporting it, and replacing it at the end of the project.
8 So, you've got a large time in between.

9 Q Okay.

10 A And what I looked at was that the -- that I made
11 the assumption that the -- the cost of the -- or the time it
12 would take -- the time, the equipment, the manpower to
13 remove and stockpile would be pretty well equal to the -- to
14 the equipment man hours, and everything else, it would take
15 to take it out of the stockpile and put it back in.

16 Q Why was that work deleted?

17 A It's deleted for a couple of reasons. No. 1 -- or
18 one of the reasons was -- was that we were in contractual
19 negotiations with a firm that would come in there and
20 develop the entire site rather than do it in a phased
21 approach. We were -- we also, in some areas that we had
22 hoped to bring them up to final grade, we -- we -- we did
23 not have enough material to bring it up to final grade. And
24 we felt that rather than putting the topsoil on and then
25 have another contractor come in behind it and take that

1 topsoil off, we'd leave that topsoil stockpiled rather than
2 putting it back down.

3 So, there was a couple of different reasons.

4 Q Okay. And I want -- I want to concentrate on one
5 of them there just a little bit. Were your initial -- when
6 you put this bid proposal together, were you initially of
7 the impression that the excavation material would fill this
8 area?

9 A We knew it wasn't going to fill the entire Velasco
10 Terminal Site, which is approximately 90 acres, because we
11 were not sure how far the material would go.

12 It was -- the problem is, if you excavate out one cubic
13 yard, and you try to fill up a hole, it's not going to fill
14 up a 10-cubic yard hole. It's going to fill up something
15 less than that, and it's dependent upon -- somewhat on the
16 material.

17 Q I guess what I'm saying is, if you knew you weren't
18 going to fill up the hole anyway, why would you put \$219,000
19 in there for the contractor to do that work and then delete
20 90 percent of it?

21 MR. WOMMACK: Objection, form of the question.

22 A As I mentioned, the reason we deleted 90 percent of
23 the replacement of the topsoil is that we were looking at
24 other contractors, or other developers, coming in behind
25 this contract to go ahead and put in more fill material.

1 And rather than paying them -- paying this contractor to put
2 it in and then turn around 6 months later and have somebody
3 else take it back out, leave it stockpiled.

4 Q (By Mr. Roberts) I apologize. You must not have
5 understood my question.

6 A I'm sorry.

7 Q Did you or didn't you know initially that you were
8 going to fill this up? When you put this bid package
9 together and did your calculations, did you know that you
10 were going to have, according to your calculation, 73 of the
11 90 acres that you needed to remove, stockpile and replace
12 the top 6 inches?

13 A At the time we award this contract, we assumed we
14 were putting back -- we would be removing, stockpiling and
15 replacing 73 acres of topsoil.

16 Q And in actuality, that figure was based on 365,000
17 cubic yards of dirt to be moved at that time, right?

18 A Based on the engineer's estimate, yes, sir.

19 Q And then what really happened was that they moved
20 408,818 yards, 43,000 extra yards; and it still didn't fill
21 it up.

22 MR. WOMMACK: I'm going to object to the form
23 of the question.

24 Q (By Mr. Roberts) Is that -- is that a true
25 statement?

1 A The plan was never to fill the enter site.

2 Q It was to fill 73 acres, I take it?

3 A No, sir.

4 Q What were you going to do about when you deleted
5 this, all of his general overhead and other things like
6 that?

7 A Part of the 73 acres that were stripped --

8 MR. WOMMACK: Wait a minute. I'm going to
9 object to the form of his question. So, do you want to
10 repeat, and read back the question.

11 MR. ROBERTS: He tells us we're out of time.
12 Let's take a break.

13 THE VIDEOGRAPHER: We're off the record at
14 3:46 p.m. End of Tape 3.

15

16 (Recess from 3:46 p.m. to 4:01 p.m.)

17 THE VIDEOGRAPHER: On the record at 4:01 p.m.
18 Beginning of Tape 3.

19 Q (By Mr. Roberts) Now, I'm going to ask you a few
20 things about material and significant, and those are some
21 words that are in your contract that I'm -- I want to talk
22 about.

23 Do you think the 43,818 yards was a material and
24 significant change in the contract?

25 A No, sir.

1 Q What do you think it would take to be a material
2 and substantial change in the contract? Material and
3 significant. I'm sorry.

4 A I would have to go back and read the bid proposal.
5 I believe there's language in there that indicates on the
6 units that we provided that these units were provided for
7 comparison of bid purposes. And basically the -- the
8 contract documents had templates in there, for instance, on
9 the excavation; that they had to excavate to a certain
10 elevation, to certain lines and grades. And as part of the
11 contract documents, there was a before survey that was done
12 that showed what the contours were. And I believe even the
13 cross-section showed the profiles of the -- of the site
14 prior -- at the time of bidding, and then it showed what was
15 to be completed.

16 Q And that resulted before in 365,000 yards, right?

17 A That was an estimated quantity, yes, sir.

18 Q Okay. But we end up with 43,818 more yards. Where
19 did it come from?

20 A Basically it's -- basically the contract showed the
21 existing contours and the revised -- and the proposed
22 contours of what the contours were to -- to complete the
23 contract, and that's what he had to excavate.

24 Q And he did excavate down to the contours that it
25 said?

1 A That's correct.

2 Q But it resulted in 43,818 more yards of dirt.

3 A Yes, sir.

4 Q Are you familiar with 10-yard dump truck?

5 A A 10-yard dump truck?

6 Q Yes, sir.

7 A It's a small dump truck; but yes, sir.

8 Q How many 10-yard dump trucks would it take if we
9 lined them up in a row to move 43,818 yards of dirt?

10 A I would have to get a calculator out.

11 Q Well, let me get you some paper here, and let you
12 just do that. I think you can probably divide 10 into it
13 pretty simple.

14 A It would take -- it would take 36,500 dump trucks
15 -- 10-yard dump trucks -- 10-yard loads to excavate the
16 material quoted in here; and it would take -- what? --
17 43,000, to do the quantity you're talking about -- I believe
18 is the quantity you're talking about, 400 and whatever that
19 quantity is.

20 Q It's 43,818. So, let's round it off to 43,000.

21 A Okay. Forty-three hundred dump truck loads.

22 Q That's 4,300 dump truck loads, and you don't think
23 that's significant?

24 A No, sir.

25 Q And you don't think that's material, changing --

1 A No, sir.

2 Q -- the terms of this contract?

3 A No, sir.

4 Q What -- what -- if it doubled, would you think that
5 was material and significant?

6 MR. WOMMACK: Object to the form of the
7 question.

8 A I've got to go back to what -- basically what --
9 how the project was put together, and what the contractor
10 was asked to bid on. We provided him with the profiles of
11 what was out there prior to the -- prior to start of
12 construction and what he was expected to do as part of the
13 contract. And, yes, he did go ahead and do that -- he did
14 cut it to the lines and grade as we -- as required.

15 Q But for bid purposes --

16 A For the bid purposes --

17 Q -- you're 365 turned out to be short. He didn't --
18 he didn't make that number up, did he?

19 A No, sir. The engineer calculated that number.

20 Q And the engineer worked for you.

21 A That's correct.

22 Q Ten percent of -- well, it's over 10 percent. On a
23 \$2.555-million contract, would be about a quarter of a
24 million dollars. That's not significant money to you?

25 MR. WOMMACK: I object to the form of the

1 question.

2 Q (By Mr. Roberts) It's a very simple question.

3 MR. WOMMACK: It's completely nonsensical, but
4 that's all right. If he can answer it, he can answer it.

5 A On a seven -- basically we agreed to pay him the
6 unit price of \$7 per cubic yard.

7 Q What about his general conditions and other things?

8 MR. WOMMACK: Object to the form of the
9 question.

10 A I -- I don't understand because, I mean --

11 Q (By Mr. Roberts) Well, let me ask you about when
12 you took the road out, you did it based on cost roughly.

13 A That's correct.

14 Q Right?

15 A Correct.

16 Q Well, why don't you do this based on cost?

17 MR. WOMMACK: Object to the form of the
18 question.

19 A I believe the contractor's claim was doing it based
20 on what he is saying was his cost. I don't agree with his
21 numbers.

22 MR. WOMMACK: I --

23 Q (By Mr. Roberts) Okay. What don't you agree with
24 about the numbers?

25 A I -- I can't -- I can't sit here right now and go

1 through all the details of his numbers.

2 Q Okay.

3 A But I don't believe that the -- that that -- what?
4 -- 10, 11-percent increase in the -- in the quantity, No. 1,
5 was material and significant; and No. 2, as I've stated, we
6 basically gave him what -- what the -- what the grades were
7 and the profiles were out there when he bid the job, and we
8 -- and -- and we said this is the profile you need to
9 basically excavate to, to go ahead, like that, and complete
10 the contract.

11 Q In the industry, would you say that it's industry
12 standard, pretty much, to build or rely upon your soil
13 borings and other data that you furnish to the contractor
14 when he's going to do the job?

15 MR. WOMMACK: I'm going to object to the form
16 of the question.

17 A I'd have to go back in there. There's language in
18 the bid documents that -- that tell him what -- what is
19 being provided and what he can or cannot rely on, or what he
20 has to go ahead and use his own judgment on.

21 Q (By Mr. Roberts) What do you think it costs to do
22 that survey and estimation for you to arrive at \$365,000 --
23 I mean, 365,000 yards?

24 MR. WOMMACK: Object to the form of the
25 question.

1 Q (By Mr. Roberts) Any idea?

2 A I don't recall what -- that was not itemized out in
3 the engineer's bill.

4 Q But you would expect the contractor to do that
5 again when he comes in?

6 A If the contractor so wished.

7 Q Okay. The 365,000-yard profile, did you ever
8 figure out where the extra dirt came from?

9 A No, sir.

10 Q Do you believe that that was a mistake in the
11 original profile?

12 A No, sir.

13 Q Well, if you can't figure out where the dirt came
14 from, and it goes up to this extra yardage, which you don't
15 think is material --

16 A No.

17 Q -- you can't tell us to this day where it came
18 from?

19 MR. WOMMACK: Object to the form of the
20 question, if it's a question.

21 A I -- I don't know how to answer that.

22 Q (By Mr. Roberts) Well, could it be that the
23 original profiles that you did were incorrect?

24 MR. WOMMACK: Object to the form of the
25 question.

1 A We relied on a registered public land surveyor to
2 survey the property initially, and we did the same thing
3 after the -- after everything was excavated; and the
4 differences come up with the calculated yardage.

5 Q (By Mr. Roberts) You must have had some kind of a
6 profile to figure 365,000 yards as an estimate, didn't you?

7 MR. WOMMACK: Object --

8 A The engineer come up with that estimate.

9 Q (By Mr. Roberts) Okay. Did that turn out to be
10 correct?

11 A It was close.

12 Q And we've already talked about close to you is that
13 43,000 out of 365 is close enough?

14 A In my past experience, yes, sir.

15 Q In going over this claim, since I've been involved
16 in it, things seem to move a little slow on the payment end
17 of this claim.

18 Can you tell me why it took so long to pay the retainage
19 to RLB?

20 MR. WOMMACK: First thing, I'm going to object
21 to the form of the question and the statement.

22 A (By Mr. Roberts) I don't remember the exact time
23 line as to when final payment was made; and substantial
24 completion, I'd have to go back and review the records on
25 that.

1 Q (By Mr. Roberts) Well, would you disagree with me
2 if I said substantial completion was in July of 2008?

3 A That sounds about right.

4 Q And would you agree with me that that retainage
5 wasn't paid until June of 2009?

6 A That may be correct.

7 Q So, almost a year. Not quite. Eleven months.

8 A That's what a calculation -- based on those two
9 days, yes, sir.

10 Q And how much of that money were y'all holding
11 during that period of time?

12 MR. WOMMACK: Object to the form of the
13 question.

14 A We basically -- well, if we look at the contract
15 amount -- and I don't know what the adjusted contract amount
16 was, but it would be 5 percent was the retainage.

17 Q (By Mr. Roberts) If one of the letters state that
18 it was around \$141,854, does that sound about right for you?

19 MR. WOMMACK: Object to the form of question.
20 If you're referring to one of my letters, show it to him.
21 No. 1, he didn't write it. Ask him about it. I wrote it.
22 Take my deposition if you want to know something about it.

23 Q (By Mr. Roberts) I'll ask you if you think that's
24 about right.

25 MR. WOMMACK: Let me see that.

1 A I don't know what that amount is based on.

2 Q (By Mr. Roberts) Could you tell me who would --

3 MR. WOMMACK: Let me look at that real
4 quick --

5 Q (By Mr. Roberts) -- knows why it took so long to
6 pay that money?

7 A I know we tried to negotiate a settlement with the
8 contractor on a number of these issues. And I thought that
9 we had a number that I felt that I could recommend to my
10 Board of Commissioners to close out this contract; and two
11 days after we had -- we had the meeting with the contractor
12 and the engineer, we received a claim for, I think it was,
13 about three quarters of a million dollars of additional
14 claims from the contractor. And at that point, I was not in
15 a position to recommend to the board that we go ahead and
16 make final payment.

17 Q And until you got -- that took 11 months to pay
18 that retainage.

19 A If those dates are correct, that's what it took,
20 yes, sir.

21 Q And just because you've got a claim from the
22 contractor at that point didn't mean that the retainage
23 wasn't due, did it?

24 A They -- we paid the retainage as quickly as we
25 could get -- come up with a -- come up with a dollar figure

1 to go ahead like that and release the balance of the funds
2 that we felt were still owed to the contractor.

3 Q So, instead of paying all of the retainage, you
4 released the balance under your calculation?

5 A We released all -- this year I -- I believe covered
6 the retainage and everything that was owed to the
7 contractor, with the exception of that \$89,000, I believe,
8 that's still on Change Order No. 9.

9 Q Right. And who would I need to depose to find out
10 why it took from July of 2008 to June of 2009 to get
11 something that pursuant to the contract is to be paid upon
12 substantial completion?

13 A We were still in the -- we were trying to negotiate
14 with the contractor to come do a settlement because we had a
15 number of outstanding claims by the contractor and issues
16 that were unsettled on additions and deletions to the
17 contract.

18 Q Is that kind of like using a hammer over his head?

19 MR. WOMMACK: Object to the form of the
20 question.

21 Q (By Mr. Roberts) Now, that's just a country boy's
22 rendition of what we call it; but leverage if you prefer.
23 Is that what it was?

24 MR. WOMMACK: Object to the form of the
25 question.

1 A I don't know if I'd call it leverage or not, or
2 call it a hammer. It is what it is.

3 Q (By Mr. Roberts) Well, what good-faith reason did
4 you believe that he wasn't due the retainage? That's for
5 work performed, right?

6 A Correct.

7 Q And that's the part I'm having difficulty
8 understanding. He may be claiming more money, but that
9 doesn't have anything to do with retainage, does it?

10 A There were issues -- there were a number of issues
11 in there that we were trying to come to a settlement
12 agreement on with the contractor.

13 Q Maybe I don't understand payments; but as I
14 understand it, when you agree to pay somebody a certain
15 amount of money, you keep a little bit of that money aside
16 for what we call "retainage."

17 A Correct.

18 Q So, you've approved all that work that was done; is
19 that correct?

20 A We approved the work that was done. We did not
21 approve of what the cost of some of that work was.

22 Q Well, isn't there a procedure where they submit a
23 bill to you and it goes through two or three people to get
24 approved and then it's paid?

25 A Yes, sir.

1 Q So, everybody had approved it to get to the point
2 for you to hold out retainage, hadn't he?

3 A I'd --I'd have to go back and look at the -- look
4 at the exact time line on that, on when we -- when we had
5 our last -- our last conversation, our last meeting with the
6 contractor and with the engineer.

7 Q Well, when was the last time you discussed this
8 with the contractor?

9 A I don't remember the exact date, sir.

10 Q Do you remember where it was?

11 A We had a -- we had a meeting at the -- at the Port
12 with the engineer and the contractor, but I don't remember
13 the dates on those.

14 Q And even if you were going to deny these additional
15 claims, every one of them, wouldn't he still be entitled to
16 his retainage for the work that was done?

17 A Part of the claim that we had on this was for a
18 substantial amount of delay and project completion. I mean,
19 this project was completed well behind schedule, even with
20 allowances for weather delays and everything else, and there
21 was liquidated damages in the contract for that.

22 Q Have they exceeded the retainage? Is that what
23 you're saying?

24 A I don't recall the exact-dollar figure, sir.

25 Q Is that your good-faith basis for withholding

1 retainage?

2 A I don't think we intentionally withheld the
3 retainage as a hammer, as you mentioned earlier.

4 Q Well, let me ask you one more time. Can you give
5 me any good-faith basis for holding that retainage.

6 MR. WOMMACK: Objection to the form of the
7 question.

8 Q (By Mr. Roberts) In it's full amount?

9 MR. WOMMACK: Sure.

10 A Not without going back and checking through the
11 records --

12 MR. ROBERTS: Would you let the --

13 MR. WOMMACK: You asked the same question over
14 and over until you confuse him and get an answer. I keep
15 objecting to the form of the question. You're to the point
16 of badgering the witness.

17 MR. ROBERTS: Make a proper objection.

18 MR. WOMMACK: I'm going to instruct him not to
19 answer if you keep badgering him. Now, I'm sorry about the
20 off-the-comment. You've been making a bunch.

21 Q (By Mr. Roberts) Can you tell me who from Freeport
22 Launch called you?

23 A John Haas called me.

24 Q Did you ever talk with anyone else at Freeport
25 Launch?

1 A No, sir.

2 Q And I think we've already talked about those times.
3 Did anyone from Freeport Launch ever come to a board
4 meeting?

5 A John Haas comes to quite a few of our board
6 meetings, and he still does.

7 Q And did he come in conjunction with the RLB
8 contract at any time?

9 A I don't recall that, no.

10 Q Did he ever come for the purposes of talking to the
11 board?

12 A He didn't -- he never addressed the board with
13 regard to this contract, to my recollection.

14 Q But didn't you have a discussion with him before
15 one of the board meetings?

16 A I usually have a discussion with most of the
17 visitors in our -- that come to our board meetings because
18 we have very few of them.

19 Q Did he express to you that he was coming to that
20 board meeting to complain about RLB contracting?

21 A I don't recall him stating that, no, sir.

22 Q Would his recollection of that be better than
23 yours? Is that what you're telling us?

24 A That's possibly so.

25 Q And you're under oath telling us that y'all never

1 discussed RLB either before or after with him?

2 A I may have discussed the contract with him. I
3 don't recall the exact conversation that we had.

4 Q In Mr. Tibedeaux's [sic] deposition, which we took
5 when you were here, on the 13th of January. We talked about
6 how many total conversations you had with him, and we were
7 talking about the gentleman from Freeport Launch, and I
8 believe you called his name a while ago, that comes to the
9 board meetings.

10 Jerome Tibedeaux [sic] told us that -- how many -- when
11 we asked him how many conversations that he had with him he
12 said, one; and when I asked one, "Where was that
13 conversation?" He said, "At the Port Freeport offices. We
14 both set in on a commissioner's meeting and then we briefly
15 sat down with David immediately after the meeting where he
16 explained why he attended the meeting. He was going to
17 raise the complaint, I think, in the commissioner's meeting
18 and decided not to do that."

19 A I don't recall that conversation.

20 MR. WOMMACK: I'm going to object to the form
21 of the question.

22 A Excuse me.

23 Q (By Mr. Roberts) And you don't have any
24 recollection of that conversation?

25 A I don't recall that conversation, no, sir.